Jurisdictional Statement

81-1320

No. _____

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IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY, H. A. PORAZZO, T. W. SWAIM, C. R. WEBB, P. A. CHAMPION, A. A. ATKINS, A. J. RUBIN, C. D. ZIMMERMAN, J. O. LARSON, JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED[1]

Whether an individual may be punished for refusing to identify himself during a lawful investigatory stop which satisfies Fourth Amendment requirements (question specifically left open in Brown v. Texas (1979) 443 U.S. 47, 53, fn. 3); whether California Penal Code section 647, subdivision (e), as limited by California state courts is a statute which satisfies the Fourth Amendment by providing enforcement guidelines and affording effective notice.

Finally, and critically important, whether a request for identification is a more substantial intrusion than a pat down search.

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1. The questions presented are limited to the Constitutional issue available to appellants and do not include that portion of the judgment below relating to the jury trial granted to determine if the officers acted in "good faith."

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, et. al., JOHN DUFFY, in his capacity as Sheriff of San Diego County, et. al.,

Defendants-Appellants,

and

H.A.PORAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol, et. al.,

Defendants-Appellants,

v.

EDWARD LAWSON,

Plaintiff-Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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JURISDICTIONAL STATEMENT

Appellants, H. A. Porazzo, William Kolender and John Duffy, et. al. appeal from that portion of the judgment of the United States Court of Appeals, Ninth Circuit which affirmed the declaration by the Federal District Court for

the Southern District of California finding California Penal Code section 647, subdivision (e) unconstitutional and enjoining appellants and Chula Vista Police Chief William J. Winters from enforcing or attempting to enforce that statute.

OPINIONS BELOW

The opinion of the Ninth Circuit appealed from, issued October 15, 1981, appears as Appendix A (pages A-1 through A-44). On December 8, 1981, appellant's request to recall the mandate was granted and is shown as Appendix E (pages A-92 through A-93). The judgment, finding of fact and conclusions of law of the District Court appear as Appendix C (pages A-74 through A-83). The opinion of the California Court of Appeal for the Second District, construing the statute at issue in this case, People v. Solomon

(1973) 33 Cal.App.3d 429, hearing denied October 11, 1983; certiorari denied 415 U.S. 951, appears as Appendix B (pages A-45 through A-73).

GROUNDS FOR JURISDICTION.

1. Nature of Proceeding and Statutory Basis for Federal Jurisdiction:

This appeal flows from a suit for damages under the Federal Civil Rights Act filed by appellee in the United States District Court for the Southern District of California. That court found the statute under which appellee was arrested (Cal. Pen. Code, § 647, subd. (e) Appen. G (page A-96)) violates the Fourth Amendment of the Constitution of the United States. The matter was then appealed to the Court of Appeals for the Ninth Circuit which held the statute had been interpreted by California's highest court (Appen. A, fn. 3, pp. A-6 through

A-8), and then proceeded to affirm the ruling below that California Penal Code section 647, subdivision (e) is unconstitutional.

2. Dates of Judgement and Appeal:

The decision of the Ninth Circuit was issued October 15, 1981. A request to stay the mandate or recall and stay the mandate was filed November 13, 1981, (Appen. D (pages A-84 through A-91)), and this request was granted December 8, 1981, with the mandate stayed pending final disposition of the appeal by this Court (Appen. E (pages A-92 through A-93)), Notices of Appeal (Appen. F (pages A-94 through A-95)), were filed November 13, 1981 and November 23, 1981 in the Ninth Circuit.

3. Jurisdiction:

Jurisdiction of this appeal is conferred by 28 United States Code

section 1254(2) which provides review by the United States Supreme Court.

> "By appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnent to the Constitution . . ."

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional provisions relied upon in the opinions below were the First Amendment, which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the fredom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

> describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

and the Due Process Clause of the Fourteenth Amendment, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.)

The California statutory law considered below is found in Title 14, chapter 2, section 647, subdivision (e) of the California Penal Code which states:

> "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> ". . . . . .
>
> "(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands such indentification."

STATEMENT OF THE CASE

The facts underlying the arrest and conviction of appellee for violating California Penal Code section

647, subdivision (e) were not part of the opinion of the District Court nor that of the Ninth Circuit (see Appendices A and C).

The history of section 647, subdivision (e) dates back to 1872 when section 647 was the vagrancy statute and provided:

> "Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for the space of ten days seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person, who lives in and about houses of ill-fame, and every common prostitute and

> common drunkard, is a vagrant, and punishable by imprisonment in the county jail not exceeding ninety days."

Through the years the statute was amended and broken into subsections. In 1903 subsection 6 related to those now covered by 647, subsection (e). At that time subsection 6 provided:

> "6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; . . ." (Stats. 1903, p. 96.)

In 1961, section 647, subdivision (e), in substantially its present form, read:

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> ". . . . . .
>
> "(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding

> circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (Stats. 1961, ch. 560, p. 1672, § 2.)

In its present form, section 647, subidivision (e) has been construed, and held to stand constitutional muster, by California courts.

THE QUESTIONS ARE SUBSTANTIAL

A. California Police Must Possess Valid Articulable Facts Before Utilizing This Minimally Intrusive Method of Protecting Against Crime

The courts below basically relied on two untenable premises when ruling California Penal Code section 647, subdivision (e) unconstitutional. The first held the statute allows police to "bootstrap" authority to make an arrest on less than probable cause and the second holds the request for identification is a more onerous intrusion than a pat down search. These are false premises because

(1) the California courts have established clear guidelines for a peace officer's invocation of the statutory right to request identification, and, (2) the intrusion is minimal compared to the crime protection it affords.

The courts below went to great lengths to note they were relying on the interpretation of section 647, subdivision (e) by the California courts in determining whether the statute passed constitutional muster. However, the federal courts then proceeded to disagree with the interpretation of the statute by the state court. This is impermissible. Where state courts have construed a state statute, that state court construction must be accepted for purposes of federal constitutional review as if the state court construction were written into the

statutes themselves. (Hebert v. Louisiana (1926) 272 U.S. 312, 316-317.)

This principle has been rigorously followed. "The interpretation by the [state court] puts [limiting] words in the statute as definitely as if it had been so amended by the legislature." (Winters v. New York (1948) 333 U.S. 507, 514. See also Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 572-573, and compare Coates v. City of Cincinnati (1971) 402 U.S. 611, 612-613, and United States v. Vuitch (1971) 402 U.S. 62, 71-72.) The federal court opinions below ignore this fundamental principle. For this reason alone, this Court should reverse.

The opinion in People v. Solomon (1973) 33 Cal.App.3d 429, fleshes out the skeletal framework of the statute to reflect what section 647, subdivision (e) means in California. The Solomon

court held the officer who seeks to utilize section 647, subdivion (e) in asking for identification must first have articulable facts sufficient for a pat down search. (People v. Solomon, supra, 33 Cal.App.3d at p. 435.) Such standards more than conform with federal constitutional requirements as well. (Brown v. Texas (1979) 443 U.S. 47, 51-52, fn. 2.)

Thus, the initial contact between the police and citizen never takes place unless there exists cause to conduct a pat down search. If a policeman could conduct a pat down search, he certainly should not be denied the right to ask identification from the person being searched. The court below was concerned the police would use this statute as a pretext to harass citizens. Appellants submit, if police want to harass citizens they can do so utilizing virtually any

penal or administrative statute they might choose. There is no way to remove laws that might be misused and have any laws at all.

Finally, the reliance by the Court of Appeals for the Ninth Circuit on United States ex rel. Newsome v. Malcolm (1974) 492 F.2d 1166, 1171-1174, is erroneous. Newsome was stopped for loitering and the New York courts found that state's loitering statute unconstitutional. That factor is not present in the instant case. The affirmance of Newsome by this Court never reached the constitutionality question, but, instead, referred to Newsome's right to file for habeas corpus relief. (Lefkowitz v. Newsome (1975) 420 U.S. 283.)

Therefore, in California, Penal Code section 647, subdivision (e) may be utilized only if ". . . the facts available to the officer at the moment

. . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." (Terry v. Ohio (1968) 392 U.S. 1, 21-22.) Once that threshold question is resolved, the police may ask a person to identify himself. Once the identification is received the citizen is free to go on his way. It is only if the citizen refuses to identify himself that an arrest can be made. This provides no more of a bootstrap arrest procedure than a Terry pat down situation. The request to submit to a pat down search is not made for the purpose of generating a refusal so the suspect can be arrested for obstructing justice and neither is the request for identification made to generate a refusal so an arrest can be made. Such an argument is one that defies rational resolution on the grounds promulgated by the courts below.

Everything from speed laws (speed limits for todays automobiles built to travel much faster) to narcotic laws (classification of narcotics as illegal although they are in demand) would be "bootstrap" statutes.

The second premise of the court below, that a request for identification is a more onerous intrusion than a pat down search, is equally unsound. Appellants would point out this Court, in the recent case of United States v. Mendenhall (1980) 446 U.S. 544, 552-554, held that questioning alone does not amount to a seizure. As discussed above, before an officer can request identification under section 647, subdivision (e) the articulable facts known to the officer must be sufficient to justify a seizure of the suspect. Therefore, California imposes a more stringent

standard than this Court on officers posing questions to citizens. In other words, this Court authorizes identification requests without statutory authority. If such nonstatutory requests are not constitutionally defective, then California's statute authorizing such requests should also be held proper.

The principal basis for the court below holding the request for identification to be more onerous than a pat down search seems to be a belief the police will create a data bank of names of people they contact under this statute. However, appellants aver the specter of government dossiers developed from such contacts reflects more paranoia than practicality. The statute and its predecessors have been in the California Penal Code for over a hundred years and no such system of government surveillance

has developed. Appellant submits there is neither the time, manpower, nor money to put the information to such a use even if the plan made sense. Furthermore, there are far more sophisiticated methods to acquire such information if the police want it. Therefore, this unfounded fear of "big brother" is unwarranted and unsupported by fact or law.

Common sense should be employed in dealing with this issue, and common sense dictates that having a person spread eagled against a car, building or on the ground while a weapons search is undertaken is far more intrusive than asking a person for identification.

California peace officers must have articulable facts to justify a pat down search before they can effect a less intrusive request for indentification. Therefore, even if the request is

characterized as a seizure, that seizure is reasonable as balanced "between the public interest and the individual's right to personal security free from arbitrary interference by law officers." (Pennsylvania v. Mimms (1977) 434 U.S. 106, 109; see also United States v. Leyba (10th Cir. 1980) 627 F.2d 1059, 1062.)

A California peace officer must have articulable cause for demanding identification. (People v. Solomon, supra, 33 Cal.App.3d at pp. 436-438.) Since this cause could support a more intrusive pat down search, the requirement of identification is reasonable. The federal courts below based their decisions on groundless fears and speculations. This Court should resolve the matter.

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B. The Statute Provides For Fair Notice

The court below found that not only was there no standard to guide police, but also there was no reasonable notice to the possible offender because section 647, subdivision (e) authorizes an arrest based on suspicions of criminality in the mind of the police officer. This completely ignores the Solomon decision as to standards (see argument A, supra). Furthermore, a citizen approached by a policeman under circumstances required by section 647, subdivision (e) is provided direct notice, as the Solomon court points out. Courts have only demanded that statutes afford men of ordinary intelligence notice of what is commanded or forbidden. (Smith v. Goguen (1974) 415 U.S. 566, 572, fn. 8; Grayned v. City of Rockford (1972) 408 U.S. 104, 108;

Diebold, Inc. v. Marshall (6th Cir. 1978) 585 F.2d 1327, 1335.) Although the statute must be understandable, police are not obligated to explain each statute they enforce. In this instance, section 647, subdivision (e) is written clearly and understandably with its literal scope narrowed by state interpretation Thus, the statute gives proper notice. It defies logic that a person of ordinary intelligence, when approached by a policeman under circumstances where the public safety demands, when asked for identification would not know a response was required.

Thus, the statute is written in language all can understand and those approached under the authority of section 647, subdivision (e) have a clear idea of what is prohibited. Since the statute does give adequate notice, this Court should decide the matter.

C. The Minimal Intrusion of Requesting Identification in the Quest to Protect From Crime Overbalances Any Right to Loiter or Wander as Those Terms Are Defined by California Courts

The court below, borrowing from the Papachristou[2/] opinion, speaks of wandering as one of the unwritten amenities afforded by the bill of rights. The court goes on to hold this unwritten amenity as more important than crime prevention. Appellants assert the court below used an improperly balanced scale in weighing these considerations. The basic problem is that the freedom of citizens to move about or wander has decreased in direct proportion to the increase in crime. If crime prevention is given secondary importance to amenities, the

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2. Papachristou v. City of Jacksonville (1972) 405 U.S. 156

amenities will vanish. There is a large segment of American society who not only is prevented from wandering, but who is fearful of walking more than a block from home because of crime.

The opinion below points out the words "loitering" and "wandering" have been given judicial construction by California courts. Neither of the words, so constructed, has any meaning similar to the free movement concept of Thoreau, Whitman, and Lindsay. "Strolling" and "wandering" in the context they envisioned is still undertaken by those who backpack, hike, jog or walk. Those are not the people being stopped under section 647, subdivision (e) because California courts have focused on the meaning of the statute to exclude them. (People v. Caylor (1970) 6 Cal.App.3d 51, 56.)

The statute does, however, have real meaning for the beat patrolman faced with a situation that meets the clear standards set forth in the statute as interpreted by the courts. There are no figures relating to section 647, subdivsion (e) arrests alone, however, figures which include section 647, subdivision (e) and four other penal statutes prohibiting similar behavior show that arrests for all of them make up

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between one and one and two-tenths percent of all misdemeanor arrests.[3/] Arrests, of course, are minimal under section 647, subdivision (e). The benefit of this statute is its use as a preventive device. This neutral inquiry, furthermore, does not offend the Fifth Amendment. (California v. Byers (1971) 402 U.S. 424, 431-432.) Therefore, the true value of section 647, subdivision (e)

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3. The statutes lumped together, in addition to section 647, subdivision (e), are Penal Code section 647, subdivisions: (c) (begging); (g) (prowling); (i) (simple trespass); and Penal Code section 647b (loitering around schools). The figures for the past five years are:

Arrests for Designated Misdemeanors	Arrests for All Misdemeanors
1976 - 8,407	869,466
1977 - 9,454	914,464
1978 - 10,711	911,366
1979 - 12,199	938,534
1980 - 12,713	1,032,006

State of California, Department of Justice, Bureau of Criminal Statistics

as a crime deterrent, when weighed against the minimal intrusion imposed on citizens, is not reflected in arrests for failing to give the identification requested. The deterrent benefit can only be derived from information given by police in relating their experiences and, unfortunately, that data is not susceptible to computer storage.

The averment in the opinion of the Court of Appeal for the Ninth Circuit that the amenities of wandering which section 647, subdivision (e) supposedly infringes upon, outweigh the crime prevention concerns of society, is a difficult allegation to respond to with facts and figures. It approaches the weighing process a judge undertakes when making a discretionary ruling. However, the people of California elected those who sit in the Legislature, and that elected body

decided the criminal deterrent value of section 647, subdivision (e) outweighed the minimal intrusion. Appellants submit this Court should rule on the matter and dispel all doubt whether the legislature acted responsibly.

CONCLUSION

The court below effectively removed an arrow from the quiver of police at a time when all proper weapons are required to deter criminal activity. California Penal Code section 647, subdivision (e), as interpreted by California courts, has appropriate standards and adequate notice to overcome any Fourth or Fifth Amendment attacks. Furthermore, the right to "stroll" and "wander" must give way to citizens concern for the safety of themselves and their property as expressed by the Legislature. Therefore, appellants respectfully ask this

Court to note jurisdiction, hear the matter, and restore a needed component of the California criminal justice system.

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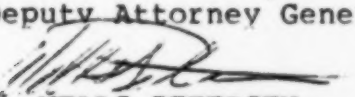

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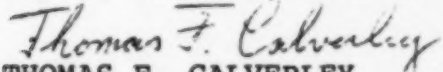

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Motion

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

MOTION FOR RELIEF FROM FILING A JOINT APPENDIX

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

MOTION FOR RELIEF FROM FILING
A JOINT APPENDIX

On March 8, 1982, this Court noted probable jurisdiction in the above entitled matter. Pursuant to rule 30, a printed joint appendix must be filed unless this Court directs otherwise.

Counsel for appellant has contacted counsel for appellee, and it is agreed the essential material set forth in rule 30.1 is presently before the Court in the appendix to the Jurisdictional Statement. Any other matters can be referred to by the parties pursuant to rule 30.2.

WHEREFORE, appellants and appellee respectfully request this Court to relieve appellants from filing a printed Joint Appendix. In the event this relief is not granted, the parties request deferral of the preparation of the joint appendix,

pursuant to rule 30.4, until 14 days after receipt of appellee's brief.

Respectfully submitted,

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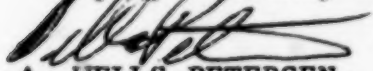

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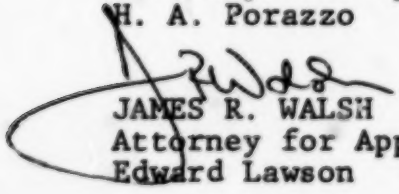

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

AFFIDAVIT OF SERVICE BY MAIL

Clifford Reed, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 110 West "A" Street, Suite 700, San Diego, California 92101; that on the 9 day of April, 19 82, affiant enclosed one true copy of the within MOTION FOR RELIEF FROM FILING A JOINT APPENDIX (Kolender, et al. v. Lawson - 81-1320)

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

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Clifford Reed

Subscribed and sworn to before me
this 9th day of April,
19 82.

Vida M. Allen
NOTARY PUBLIC in and for the County of
San Diego, State of California.

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1983

SD CL-3 (11/78)

Appendix

81-1320
No. _____

Office - Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY, H. A. PORAZZO, T. W. SWAIM, C. R. WEBB, P. A. CHAMPION, A. A. ATKINS, A. J. RUBIN, C. D. ZIMMERMAN, J. O. LARSON, JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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Appendix A

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Nos. 79-3629, 79-3633, 79-3641,
and 79-3685

EDWARD LAWSON,

Plaintiff-Appellee,

v.

WILLIAM KOLENDER,

Defendant-Appellant.

[Argued and Submitted
May 6, 1981.
Decided October 15, 1981]

Appeal from the United States District Court for the Southern District of California.

Before: FERGUSON and BOOCHEVER, Circuit Judges, and REDDEN,* District Judge.

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* Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

BOOCHEVER, Circuit Judge.

This case involves the constitutionality of section 647(e) of the California Penal Code,[1] a vagrancy statute, and whether a pro se litigant has a right to jury trial in spite of his failure to file proposed jury instructions seven days in advance of trial as required by local rules of court.

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1. Section 647(e) provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, misdemeanor: ....(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Cal, Penal Code § 647(e) (Deering 1971).

On approximately fifteen occasions between March, 1975 and January, 1977, Edward Lawson was stopped by law enforcement officials. On each occasion, he was detained or arrested on the basis of California Penal Code § 647(e). Lawson was prosecuted only twice for the alleged offenses; one resulted in dismissal, the other in conviction. Lawson filed a complaint seeking: (1) a declaratory judgment that section 647(e) is unconstitutional; (2) a mandatory injunction restraining the enforcement of the section; and (3) compensatory and punitive damages against various officers who arrested him because they deprived him of his constitutional rights.

Following a trial, the district court filed a memorandum opinion and judgment. The district court found that the statute was overbroad, noting that

"a person who is stopped on less than probable cause cannot be punished for failing to identify himself." The court therefore enjoined enforcement of the statute. The court held, however, that Lawson could not recover damages because each officer had a good faith belief that each "contact and/or arrest was lawful." H. A. Porazzo, the named state official, appeals contending that the statute is constitutional.[2/] Lawson cross-appeals contending that the district court erred in denying him a jury trial. We affirm the district court ruling that the statute is unconstitutional but reverse the court's denial of a jury trial.

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2. The other defendants also appeal, and all the appeals have been consolidated for argument and decision.

I. CONSTITUTIONALITY OF SECTION 647(e)

A. VAGUENESS

1. Introduction

In Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 495, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), we struck down a vagrancy ordinance from Henderson, Nevada, that was virtually identical to section 647(e). The ordinance was void for vagueness both because it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden and because it encouraged arbitrary and erratic arrests and convictions. Id. at 95. We also held that the ordinance violated the fourth amendment by permitting arrests without probable cause. Id. at 96. See also Anderson v. Nemetz, 474 F.2d 814, 817 (9th Cir. 1973). For the reasons

expressed in Powell, section 647(e) is also unconstitutional unless the California appellate courts have authoritatively construed the statute so as to cure its defects. We will assess the constitutionality of the statute in light of the California courts' interpretations of it.[3/]

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3. In Wainwright v. Stone, 414 U.S. 21, 22-23, 94 S.Ct. 190, 192, 38 L.Ed.2d 179 (1973), the Supreme Court held that for purposes of determining vagueness a state statute must be reviewed as the state's highest court has interpreted it. Moreover, the construction placed upon a statute by a state's intermediate appellate court which was left undisturbed, though not specifically passed upon, on appeal to the state's highest court is similarly binding on the federal courts. Thorington v. Cash, 494 F.2d 582, 587 (5th Cir. 1974); Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 364 F.2d 957, 965-67 (5th Cir. 1966) (rule applies if state supreme court's denial of hearing of the appellate court's decision is a decision on merits); Echevarria v. Carey, 402 F.Supp. 183, 185 n.7 (S.D.N.Y.1975) aff'd, 538 F.2d 309 (2d Cir.), vacated on other grounds,

The California courts have considered the constitutionality of section 647(e) on several occasions. Each

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429 U.S. 808, 97 S.Ct. 44, 50 L.Ed.2d 68 (1976). The California Supreme Court denied a hearing in People v. Solomon, 33 Cal.App.3d 429, 439, 108 Cal.Rptr. 867 (1973) (Tobriner and Mosk, JJ., dissenting), cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567 (1974), discussed in text infra. The decision to grant a hearing, however, is discretionary with the California Supreme Court. See People v. Davis, 147 Cal. 346, 81 P. 718, 719 (1905); J. Poulos & B. Varner, Review of Intermediate Appellate Court Decisions in California, 15 Hasting L.J. 11, 15-16 (1963); Comment, To Hear or Not to Hear: A Question for the California Supreme Court, 3 Stanford L.Rev. 243, 266-67 (1951). Although a denial of hearing is not to be regarded as an approval of a California Court of Appeal opinion, the California Supreme Court has stated that "it does not follow that such a denial is without significance as to our views." Amaya v. Home Ice, Fuel & Supply Co., 59 Cal.2d 295, 379 P.2d 513, 519, 29 Cal. Rptr. 33 (1963) (quoting Di Genova v. State Bd. of Educ., 57 Cal.2d 167, 178, 367 P.2d 865, 18 Cal.Rptr. 369 (1962)). See People v. Triggs, 8 Cal.3d 884, 506 P.2d 232, 236, 106 Cal.Rptr. 408 (1973); Kanner, It's a Busy Court: the Effect of Denial of Hearing by the Supreme Court on Court of Appeals Decisions, 47

time the statute has been unheld.[4/] The most recent and extensive discussion is contained in People v. Solomon, 33 Cal.

Calif.St.B.J. 188 (1972). Moreover, California intermediate courts will, at least occasionally, show greater deference to another intermediate court's decision where review has been denied. People v. Rowland, 19 Cal.App.2d 540, 65 P.2d 1333, 1334 (1937). Most importantly, a decision by a California intermediate court is binding upon all California courts exercising inferior jurisdiction until the Supreme Court decides the issue or a conflicting intermediate decision is issued. Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 369 P.2d 937, 939-40, 20 Cal.Rptr. 321 (1962); In Re Ferrie, 115 Cal.App.3d 729, 171 Cal.Rptr. 496, 498 (1981). The Solomon decision has been the law of California for eight years. Under these circumstances, we will treat the Solomon opinion as authoritative especially since Lawson agreed below that the statute should be reviewed as construed by the Solomon court and does not now contend otherwise. The same result was reached in Miranda v. Hicks, 388 F.Supp. 350, 355-56 (C.D.Cal. 1974), rev'd on other grounds, 422 U.S. 332, 95 S.Ct. 228, 45 L.Ed.2d 223 (1975) (California obscenity statute had been authoritatively construed by California Courts where California intermediate court rendered a decision and a hearing was denied by the California Supreme Court.

App.3d 429, 108 Cal.Rptr. 867 (1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567 (1974). Solomon held that section 647(e) did not violate the federal constitution because: (1) it was not vague, 33 Cal.App.3d at 435-36, 108 Cal.Rptr. 867; (2) the requirement of identification did not infringe upon the right to be free from unreasonable searches and seizures, id. at 436, 108 Cal.Rptr. 867; (3) the identification requirement did not violate the right against self-incrimination, id. at 436-38, 108 Cal.Rptr. 867; and

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4. People v. Solomon, 33 Cal.App. 3d 429, 108 Cal.Rptr. 867 (1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567 (1974); People v. Caylor, 6 Cal.App.3d 51, 85 Cal.Rptr. 497 (1970); People v. Weger, 251 Cal.App.2d 584, 59 Cal.Rptr. 661 (1967), cert. denied, 389 U.S. 1047, 88 S.Ct. 774, 19 L.Ed.2d 840 (1968); People v. Bruno, 211 Cal.App.2d Supp. 855, 27 Cal.Rptr. 458 (App.Dep't Super.Ct.1962).

(4) the statute was not invalid as susceptible to arbitrary enforcement, id. at 438-39, 108 Cal.Rptr. 867.

Section 647(e)[5] contains three essential elements: (1) loitering on the streets; (2) refusal to identify and account for one's presence on request by a police officer; and (3) in circumstances involving public safety. The courts have placed the following limitations on the essential elements. "Loitering" means "lingering in ... designated places for the purpose of committing a crime as opportunity may be discovered", while "wandering" means "movement for evil purposes." People v. Caylor, 6 Cal.App.3d 51, 56, 85 Cal. Rptr. 497, 501 (1970). The term "identification and accounting" is not

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5. For the complete text of § 647(e), see note 1, supra.

satisfied by mere identification but "comprehends a genuine identification ... carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Solomon, 33 Cal.App.3d at 438, 108 Cal.Rptr. 867[6/] The phrase "surrounding circumstances ... indicate to a reasonable man that public safety

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6. Section 647(e) also requires a person to "account for his presence." In People v. Weger, 251 Cal.App.2d 584, 59 Cal.Rptr. 661, 672-73 (1967) cert. denied, 389 U.S. 1047, 88 S.Ct. 774, 19 L.Ed.2d 840 (1968), the California Court of Appeals held that this requirement did not violate the privilege against self-incrimination. Because of intervening Supreme Court cases, the Solomon court held that accountability could not be required and thus, to avoid impinging upon the privilege, it construed that requirement as "subordinate and adjunct to" the identificaiton requirement and operative only to the extent it assists in producing reliable, credible identification. 33 Cal.App.3d at 437-38, 108 Cal.Rptr. 867.

demands such identification" is comparable to the Standard set forth in Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968), justifying a brief detention. Solomon, 33 Cal.App.3d at 435, 108 Cal.Rptr. 867.

We must decide whether the statute as interpreted by the California courts violates the vagueness doctrine[7]/

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7. The vagueness doctrine concerns cases in which a court, passing upon state or federal statutes, has to determine whether the "words and phrases [of the statute] are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process." Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 243, 52 S.Ct. 559, 568, 76 L.Ed. 1062 (1932). Due process is violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that contemplated conduct is prohibited. The vagueness doctrine can be divided into three related concerns: (1) protecting against arbitrary enforcement of a statute; (2) safeguarding constitutionally protected rights; and (3) providing fair notice of prohibited conduct. Keenan, California Penal Code

because: (1) it is in violation of the fourth amendment proscription against searches and seizures; (2) it contains a vague enforcement standard which is susceptible to arbitrary enforcement; or (3) it fails to give fair and adequate notice of the type of conduct prohibited. We will address each issue separately.

2. Fourth Amendment

[1] The statute, in essence, requires a person to provide reliable identification when requested by a

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Section 647(e): A Constitutional Analysis of the Law of Vagrancy, 32 Hastings L.J. 285, 294 (1980) (hereinafter cited as "Keenan"). For a thorough discussion of the vagueness doctrine, see Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim.L.Bull. 205 (1967); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960); Note, Due Process Requirements of Definiteness in Statutes, 62 Harv.L.Rev. 77 (1948).

police officer who has a reasonable suspicion of criminal activity under the standard of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).[8/] Whether such a requirement violates the

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8. It has been argued that the language relied upon by the Solomon court is not the language of Terry which sets forth the test for a reasonable detention under the fourth amendment. Keenan, supra note 7, at 299. The language relied upon is the following: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968). See Solomon, 33 Cal.App.3d at 435, 108 Cal.Rptr. 867. The critic correctly points out that the applicable test under the fourth amendment requires that a police officr making a detention "'be able to point to specific and articulable facts which, taken together with rational inferences from these facts,' reasonably warrant the conclusion that the individual is involved in criminal activity." Keenan, supra note 7, at 299 (quoting Terry, 392 U.S. at 21, 88 S.Ct. at 1879). We believe that the Solomon court meant to incorporate in principle the standards enunciated in Terry.

forth amendment's proscription against unreasonable searches and seizures was specifically left open by the Supreme Court's decision in Brown v. Texas, 443 U.S. 47, 53n.3, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979) (holding that a person could not be required to furnish identification if not reasonably suspected of any criminal conduct).

Because Terry approved a more substantial intrusion upon the person (a limited patdown search for weapons) when a police officer possesses "articulable suspicion less than probable cause," 392 U.S. at 31, 88 S.Ct. 15 1885, the Solomon

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court concluded that a temporary detention followed by a request for identification also was justifiable.[9] 33 Cal.App.3d at 435-37, 108 Cal.Rptr.867. The Solomon court applied the Terry test by balancing the public interest with the individual's right to personal security free from arbitrary interference by law officers. It found that "the public need involved, protection of society against crime, is strong, while the individual right involved, anonymity

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9. This analysis is slightly askew since Terry requires that an officer possess both reasonable suspicion that criminal activity is afoot and that the prson with whom he is dealing may be armed and dangerous. Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968); 3 W. La Fave, Search and Seizure § 9.3, at 63-69 (1978). A reasonable suspicion of criminal activity alone is insufficient to justify a patdown search. See Powell v. Stone, 507 F.2d 93, 96 n.3 (1974), rev'd on other grounds, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

when loitering on the streets under suspicious circumstances, is weak." 33 Cal.App.3d at 436-37, 108 Cal.Rptr. 867.

Although the prevention of crime is "a weighty social objective," Brown, 443 U.S. at 52, 99 S.Ct. at 2641, we agree with the courts and commentators who have concluded that statutes like section 647(e), which require the production of identification, are in violation of the fourth amendment. The two reasons for this conclusion are that as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause,[10] and the serious intrusion on personal

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10. See Terry v. Ohio, 392 U.S. 1, 34-35, 88 S.Ct. 1868, 1886, 20 L.Ed.2d 889 (1968) (White, J. concurring) ("the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest"); Michigan v. De Fillippo, 443

security outweighs the mere possibility that identification may provide a link leading to arrest.

The first reason was explained by the Second Circuit when it considered a New York vagrancy statute which, as written, was very similar to section 647(e) as construed by the Solomon

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U.S. 31, 44-45, 99 S.Ct. 2627, 2635-2637, 61 L.Ed.2d 343 (1979) (Brennen, J., dissenting); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1172 (2d Cir. 1974) aff'd sub nom. Lefkowitz, Atty. Gen. of New York v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975); People v. De Fillippo, 80 Mich. App. 197, 262 N.W.2d 921, 924 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E. 2d 411, 414-15, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); Keenan, supra note 7, at 298-301. But see State v. Ecker, 311 So.2d 104, 107-09 (Fla.), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975).

court.[11] United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1171-74 (2d Cir. 1974), aff'd sub nom. Lefkowitz, Attorney General of New York v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975). In finding the the statute unconstitutional, the Newsome court noted that such vagrancy statutes "conflict with the deeply rooted Fourth

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11. The vagrancy statute permitted a police officer to arrest an individual who, after inquiry by the officer, refused to identify himself, "under circumstances which justify suspicion that he may be engaged or about to engage in crime." 492 F.2d at 1171. The quoted language is very similar to the reference in Terry to the situation where an officer is led "to conclude in light of his experience that criminal activity may be afoot." Terry, 392 U.S. at 30, 88 S.Ct. at 1884. Just as the Solomon court saw no essential difference between the Terry standard and the standard in its statute, 33 Cal.App.3d at 435, 108 Cal.Rptr. 867, we see no essential difference between the Terry standard and the standard in the New York statute. Therefore, there is no essential difference between the New York statute and the California statute.

Amendment requirement that arrests must be predicated on probable cause." Id. at 1172.

As we stated in Powell, this vagrancy ordinance subverts the probable cause requirement.

> It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. But more is required to justify arrest.

507 F.2d at 96 (citations omitted). Other courts considering similar statutes

have reached the same conclusion.[12] Vagrancy ordinances cannot turn otherwise innocent conduct into a crime.

The second reason why we believe section 647(e) intrudes upon the fundamental right to be secure against unreasonable searches and seizures is that the Solomon court improperly applied the Terry balancing test. We agree that prevention of crime is "a weighty social objective." Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). The right of an individual wanderer to be free from the governmental intrusion of being required

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12. See People v. De Fillippo, 80 Mich.App. 197, 262 N.W. 2d 921, 923-24 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, 414-15, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973). See also Hall v. United States, 459 F.2d 831, 835-36 (D.C.Cir.1972) (en banc).

to furnish identification, however, is also substantial. The Supreme Court has extolled the freedom of locomotion.

> Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. The qualification "without any lawful purpose or object" may be a trap for innocent acts....
>
> Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be "casing" a place for a holdup....
>
> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

> They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.

Papaschristou v. City of Jacksonville, 405 U.S. 156, 164 92 S.Ct. 839, 844, 31 L.Ed.2d 110 (1972) (footnotes ommitted).[13/]

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13. See also People v. De Fillippo, 80 Mich.App. 197, 262 N.W. 921, 924 (1977) (quoting Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579, 582-83 (1889), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979):

> Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion,--to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of

Additionally, we do not agree with the Solomon court's premise that a pat down is necessarily a more substantial intrusion than the identification requirement contained in section 647(e). See 33 Cal.App.3d at 435, 108 Cal.Rptr. 867. There is only surface appeal to the argument that because a pat down

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> no other citizens, there, they will be protected under the law, not only their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees.

involves greater physical intimidation and requires more direct bodily contact than the production of identification, the latter may be required whenever the former is permitted. Although the pat down can be a degrading experience, especially when conducted in public view,[14/] it is ephemeral, and, in the absence of weapons, lacks collateral consequences. The potential for subsequent police action or abuse is not materially enhanced.

In contrast, police knowledge of the identity of an individual they have deemed "suspicious" grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended. Information concerning the stop, the

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14. See Michigan v. Summers, ___ U.S. ___, 101 S.Ct. 2587, 2592, 69 L.Ed.2d 340 (1981).

arrest and the individual's identity may become part of a large scale data bank. In fact, the public concern advanced in support of section 647(e) is the prevention of crime, Solomon, 33 Cal.App.3d at 436-37, 108 Cal.Rptr. 867, namely the state's interest in allowing police officers to gather information which will aid them in detecting crime.[15/] The Supreme Court has recognized the significant intrusion occasioned by an identification requirement in a statute. See Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979). We believe that the serious intrusion on

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15. See Keenan, supra note 7, at 300. As the California District Attorneys Association explains in its amicus curiae brief in support of the appellants, section 647(e)'s identification requirement "allows [an officer] to obtain the identity of a person so that, should it develop that the person identified and released was involved in crime, he or she can be located."

personal security outweighs the mere possibility that identification may provide a link leading to arrest.

The cases relied upon by the appellants are inapposite. In United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), the Supreme Court held that a vehicle may be stopped at a fixed checkpoint near the border for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens. Id. at 556-64, 96 S.Ct. at 3082-3085. In so holding, the Court weighed the public interest against the fourth amendment interest of the individual. Id. at 556-60, 96 S.Ct. 3082-3084. The government interests recognized in Martinez, including the importance of stopping the flow of illegal aliens at locations

close to the border, are simply not applicable here, where we consider the right of the general populace of California to move throughout the state without restriction. The same can be said about the government's reliance on Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). In Mimms, the Supreme Court held that asking the driver of a car which had been stopped for a traffic violation to step out of the car did not violate the guarantees contained in the fourth amendment. The Court found that the government's justification, safety of the officer, outweighed the minimal intrusion upon the person who had already been legitimately stopped. Id. at 110-11, 98 S.Ct. at 333. The government's justification of the section 647(e) identification requirement

is not as significant since an officer's demand may be made in the absence of any known unlawful conduct, and the intrusion is not de minimis. Moreover, a license to operate a vehicle is a privilege, see Serenko v. Bright, 263 Cal. App.2d 682, 70 Cal.Rptr. 1, 4-5 (1968), not a constitutionally protected right like the freedom to go where one pleases. See Papachristou, 405 U.S. at 163-65, 92 S.Ct. at 843-845.

We hold that section 647(e) impermissibly intrudes upon the fourth amendment's proscription against unreasonable searches and seizures.

3. Arbitrary Enforcement

A statute violates the due process clause when it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement. Papachristou, id. at 162, 92 S.Ct. at 843. The Solomon

court held that section 647(e) was not so susceptible because it becomes operative only when the surrounding circumstances indicate to a reasonable man some impairment of the public safety, and when such circumstances can be objectively defined and articulated. Solomon, 33 Cal.App.3d at 438-39, 108 Cal.Rptr. 867. Accord State v. Ecker, 311 So.2d 104, 110 (Fla.), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975).

[2] We again find ourselves in agreement with United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974), aff'd sub nom. Lefkowitz, Attorney General of New York v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975). We believe that section 647(e) impermissibly grants the police virtually unfettered discretion by

providing no standards for determining whether a person is engaged in suspicious loitering, and by failing to specify what forms of identification are sufficient to satisfy the statute. This result has been reached by other courts considering statutes similar to section 647(e)[16]. Moreover, the Solomon approach, although providing safeguards against unwarranted convictions because arrest decisions are subject to independent review, does not protect against

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16. See, e.g., People v. De Fillippo, 80 Mich.App. 197, 262 N.W.2d 921, 923 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, 414, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973); City of Portland v. White, 9 Or.App. 239, 495 P.2d 778, 779 (1972).

arbitrary arrests or police harrassment, which are also prohibited by the fourth amendment.[17]

Under section 647(e) it could well be conceivable that a group might lawfully meet in support of an unpopular cause. One waiting outside for the meeting to commence could be required, at the unbridled discretion of an officer, to furnish identification at the peril of being arrested. Section 647(e) could well create a chilling effect on the exercise of first amendment rights.

As the court noted in Newsome:

> the section could lend itself to the abuse of pretextual arrest of people who are members of unpopular groups or who are merely suspected of engaging in other crimes,

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17. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 32 L.Ed.2d 110 (1972).

> without sufficient probable cause to arrest for the underlying crime.

492 F.2d at 1173 (footnote omitted). This case furnished a similar example. In less than two years, Lawson was arrested on approximately fifteen occasions for violating section 647(e). Of those fifteen arrests, only two resulted in prosecution, and one of those cases was dismissed.[18] We hold that section

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18. See also Newsome, 492 F.2d at 1173 (quoting People v. Williams, 55 Misc.2d 774, 286 N.Y.S.2d 577 (Crim.Ct. 1967)).

> [T]hese defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th .... This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night

647(e) violates the due process clause because it encourages arbitrary and discriminatory enforcement.

4. Fair and Adequate Notice

[3] The due process clause requires that a penal statute "'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden....'"[19] The Solomon court

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court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

19. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 83, 843, 31 L.Ed.2d 110 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954)).

held that section 647(e) met this test because

> the person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification must first be made.

33 Cal.App.3d at 435, 108 Cal.Rptr. 867.

[4, 5] We believe that this reasoning circumvents the question of whether fair notice is provided.[20] Due process demands both reasonable notice to the possible offender and a specific standard to guide police. Powell v. Stone, 507 F.2d 93 96 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1965). Section 647(e) fails to identify any commonly understood act of suspicious

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20. See Keenan, supra note 7, at 301.

circumstances of which ordinary citizens are aware; it authorizes arrest merely "if suspicion of criminality happens to be created in the mind of the arresting officer."21/

> An innocent person cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime.

People v. De Fillippo, 80 Mich.App. 197, 262 N.W.2d 921, 923 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). When a person is stopped by the police and asked for identification, the individual must either comply with the request or

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21. People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, 413, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973).

face arrest without any basis for determining whether the denial constitutes a violation of the statute. Since "[n]o one may be required under peril of life, liberty or property to speculate as to the meaning of penal statutes," Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939), section 647(e) is unconstitutionally vague.

B. SELF-INCRIMINATION

Because we hold that section 647(e) is void for vagueness, we need not decide whether the identification requirement of the statute violates the privilege against self-incrimination protected by the fifth amendment. We note, however, that two state courts have struck down similar statutes on the grounds that an individual may not be compelled to indentify himself or

herself.[22] These cases rely on Justice White's concurring opinion in Terry in which he stated that

> the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest ...

Terry, 392 U.S. at 34, 88 S.Ct. at 1886. Although the Supreme Court has never directly addressed the issue, the Court has cited Justice White's statement with approval on several occasions.[23]

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22. See People v. De Fillippo, 80 Mich.App. 197, 262 N.W.2d 921, 924 (1977), rev'd on other grounds, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, 416, cert. denied, 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550 (1973). But see State v. Ecker, 311 So.2d 104, 109-10 (Fla.), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975).

23. See, e.g., Brown v. Texas, 443 U.S. 47, 53 n.3, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979); Dunaway v. New York, 442 U.S. 200, 210 n.12, 99 S.Ct. 2248, 2255, 60 L.Ed.2d 824 (1979). But Cf. Adams v. Williams, 407 U.S. 143, 146,

II. DENIAL OF A JURY TRIAL

Lawson contends that the court abused its discretion in denying him a jury trial. When Lawson filed his initial complaint, he demanded a jury trial. During the course of this extended litigation, Lawson was represented by several attorneys, and on March 14, 1979, he was substituted in pro per by stipulation. On March 21, 1979, the trial began and Lawson asked the judge why there was no jury. The court informed Lawson that his right to a jury trial had automatically been waived because he failed to file proposed jury instructions seven days in advance of trial, as required by

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92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972)("brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer").

two local rules of court.[24] Lawson then requested a continuance to submit instructions, but his request was denied.

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24. The district court apparently relied on the following Local Rules of Practice for the United States District Court for the Southern District of California:

Rule 235-4(j) provides in part:

(j) Preparation for Trial

Unless otherwise ordered, the parties shall, not less than seven calendar days prior to the date on which the trial is scheduled to commence: ....

(ii)(a) In jury cases, serve and file proposed voir dire questions, jury instructions, and forms of verdict which shall conform to Local Rule 245-3;

Rule 245-3 provides in part:

Unless otherwise ordered, each party shall serve and file proposed jury instructions in accordance with Local Rule 235-4(j). The judge may in his discretion, receive additional requests for instructions at any time prior to the commencement of argument to the jury.

The local rules do not provide for automatic waiver of a jury trial for failure to submit instructions. Nevertheless, the appellants argue that such a waiver may fairly be implied. Under Federal Rule of Civil Procedure 38(b) and (d), a party waives the right to a jury trial if a timely demand is not made. The appellants argue that the local rules implement Rule 38 by setting procedural requirements necessary to the orderly administration of a jury trial. The seven-day rule contemplates that parties and the court will have adequate time to review the proposed jury instructions for form and content. The appellants argue that by failing to comply with the local rules, Lawson waived his right to a jury trial and therefore the court did not abuse its discretion in so holding.

[6] We believe that this sanction was too harsh. The right to a jury trial is inviolate and should be preserved. Fed.R.Civ.P. 38(a). See Colgrove v. Battin, 413 U.S. 149, 152, 93 S.Ct. 2448, 2450, 37 L.Ed.2d 522 (1973). Moreover, since the local rules do not expressly provide for automatic waiver and are essentially for the court's convenience, Lawson's right to a jury trial should not have been denied where he had no warning of this severe sanction and alternative sanctions existed. In fact Rule 245-3, by granting the judge discretion to receive late requests, infers that loss of the right to submit instructions, not the right to a jury trial, is the type of sanction to be imposed. Cf. Rutledge v. Electric Hose & Rubber Co., 511 F.2d 688, 674, (9th Cir. 1975) (local rule

regarding demand for jury trial is valid where it does not impose basic procedural requirements beyond Fed.R.Civ.P. 38).

Upon remand, the jury may reach the same conclusion the judge did and find that the police officers relied upon the statute in good faith in making the arrests. On the other hand, the jury may instead find that the arrests were not made in good faith and that they were merely made for the purpose of harassing Lawson, since very few of the arrests ended in prosecution. The good faith of the defendants is a factual issue which Lawson was entitled to have a jury determine. Under the circumstances of this case, we hold that the district court abused its discretion in denying a jury trial.

The case is AFFIRMED in part and REVERSED in part, and REMANDED for a jury trial to determine the good faith of various officers involved.[25]

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25. Since we remand the case for a jury trial, we need not decide whether the district court abused its discretion in denying Lawson's request for a continuance on the day of trial, in order to either obtain counsel or prepare himself for trial.

Appendix B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	Crim. 23269
Plaintiff and Appellant,	
v.	
ARNOLD JAY SOLOMON,	
Defendant and Respondent.	

[Decided July 13, 1973]

OPINION

FLEMING, J.---Arnold Solomon was charged in municipal court with a violation of Penal Code section 647, subdivision (e). That statute makes a person guilty of disorderly conduct: "Who loiters or wanders upon the streets or from place to place without apparent reason or

business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The trial court sustained Solomon's demurrer to the complaint and entered judgment dismissing the cause. The appellate department of the superior court reversed the judgment of dismissal and certified the cause to this court. We ordered the cause transferred here to reconsider the constitutionality of section 647, subdivision (e) in the light of United States Supreme Court decisions rendered subsequent to our decision in 1967 upholding the constitutionality of the statute. (People v. Weger, 251 Cal. App.2d 584 [59 Cal.Rptr. 661].)

I

Under specified circumstances section 647, subdivision (e) imposes a duty on a street loiterer to respond to a peace officer's inquiry, and in default of response the loiterer may be found guilty of the misdemeanor of disorderly conduct.[1/] The essentials of section 647, subdivision (e) are three: (1) loitering on the streets, (2) refusal to identify and account on request, (3) in circumstances involving the public safety.

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1. The disorderly conduct statute, in large part derived from fourteenth-century vagrancy laws that established crimes of status, was revised by the Legislature in 1961 to change disorderly conduct from a crime of status to one of conduct. The metamorphosis of section 647, subdivision (e) from a vagrancy statute into its present form may be followed in Arthur H. Sherry, Vagrants, Rouges and Vagabonds--Old Concepts in Need of Revision (1960) 48 California Law Review 557, and in 1959-1961 Report, California Assembly Interim Committee on Criminal Procedure, 22 Assembly Interim Committee Reports No. 1 (1961).

In Weger, likewise a ruling on demurrer, we held that the justaposition of these three elements provided a sufficient basis to support the duty to respond created by the statute. Since that decision a series of United States Supreme Court opinions has delineated the scope of police power in the streets and clarified its relationship to the law of search and seizure and the law of incrimination. We briefly review these developments.

1. Temporary Detention. In Terry v. Ohio (1968) 392 U.S. 1 [20 L.Ed.2d 889, 88 S.Ct. 1868], the court upheld the validity of temporary detention as a form of street control and ruled that peace officers are authorized to stop and frisk persons on suspicion even though probable cause for arrest

is lacking. Under appropriate circumstances, said the court, the governmental interest in effective crime prevention and detection justifies official intrusion into the constitutionally protected interests of private citizens. The test for determining the reasonableness of a particular intrusion involves a balancing of the government's need for intrusion against the invasion of private rights that the intrusion entails. "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (392 U.S. at p. 21 [20 L.Ed.2d at p. 906].) (1) The decision in Terry has made it clear that when the surrounding circumstances reasonably indicate to a peace officer that the

public safety demands that he stop and frisk a person on the streets, the officer is constitutionally entitled to do so.

2. Self-incrimination. In Marchetti v. Unites States (1968) 390 U.S. 39 [19 L.Ed.2d 889, 88 S.Ct. 697], and Grosso v. United States (1968) 390 U.S. 62 [19 L.Ed.2d 906, 88 S.Ct. 709], the Supreme Court overturned as a violation of the privilege against self-incrimination the requirement that gamblers register for and pay a federal occupational tax. The court noted the illegality of gambling in most states and concluded that a requirement that gamblers register and pay a tax would compel them to incriminate themselves. The same reasoning was followed in Haynes v. United States (1968) 390 U.S. 85 [19 L.Ed.2d 923, 88 S.Ct. 722], where

the court invalidated a law requiring registration of proscribed firearms, such as machine guns and sawed-off shotguns, and it was again followed in Leary v. United States (1969) 395 U.S. 6 [23 L.Ed.2d 57, 89 S.Ct. 1532], where the court overturned Leary's conviction for failure to comply with provisions of a marijuana transfer tax because compliance and registration under the law would subject him to a high risk of incrimination.

In recent years the privilege against self-incrimination, historically a testimonial privilege that became operative when claimed,[2] has been extended

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2. This view was summarized in Justice Stewart's concurring opinion in Leary v. United States (1969) supra, 395 U.S. 6, at page 54 [23 L.Ed.2d 57, at page 92]: ". . . I have before now expressed my conviction that the Fifth Amendment guarantee against compulsory self-incrimination was originally

to cover a variety of possible incriminating inquiries, testimonial and non-testimonial, and the requirement that the privilege must be claimed in order to come into effect has been watered down. Today, in some incriminating situations the mere posing of the inquiry may violate the privilege against self-incrimination and obviate the necessity for either reply or for claim of privilege.

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intended to do no more than confer a testimonial privilege in a judicial proceeding. But the Court through the years has drifted far from that mooring; the Marchetti and Grosso cases are simply the most recent in a long line of decisions marking the extent of the drift. Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in the light of the original constitutional meaning. Until that day comes, it seems to me that the authoritative weight of precedent permits no excape from the conclusion reached by the Court in this case." (Fns. omitted.)

3. Duty to Furnish Information. In California v. Byers (1971) 402 U.S. 424 [29 L.Ed.2d 9, 91 S.Ct. 15], the Supreme Court upheld a California requirement that a driver involved in a vehicle accident give the owner of damaged property the name and address of the driver and that of the owner of the vehicle involved. Possible danger of self-incrimination as a consequence of furnishing identification, said the court, must yield to a civic duty to disclose required information, at least where the information is not essentially incriminatory. "[T]he mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here. . . . In order to invoke the privilege it is necessary to show that the compelled disclosures

will themselves confront the claimant with 'substantial hazards of self-incrimination.'" (P. 428, 429 [29 L.Ed.2d pp. 17, 18].) Disclosure of the driver's identity is not evidence of a testimonial or communicative nature within the meaning of the Constitution, said the court, for a name does not implicate anyone in criminal conduct. The court cited with approval United States v. Sullivan (1927) 274 U.S. 259 [71 L.Ed. 1037, 475 S.Ct. 607, 51 A.L.R. 1020,], where the failure of a bootlegger to file an income tax return was held not excused by the privilege against self-incrimination, an excuse whose acceptance Justice Holmes thought would amount to "an extreme if not an extravagant application of the Fifth Amendment." (Pp. 263-264 [71 L.Ed. pp. 1039-1040].)

4. Invalidity of Traditional Vagrancy Statutes. In Papachristou v. City of Jacksonville (1972) 405 U.S. 156 [31 L.Ed.2d 110, 92 S.Ct. 839], the Supreme Court found impermissibly vague a vagrancy ordinance whose language followed the historic pattern.[3/] The law was void for vagueness, said the court, because it withheld fair notice

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3. The law defined as vagrants subject to misdemeanor charges: "Rouges and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, commons drunkards, common night walkers, thieves, pilferers, or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . ."

of the particular conduct that was forbidden and because it encouraged arbitrary and erratic arrests and convictions.

In Palmer v. City of Euclid (1971) 402 U.S. 544 [29 L.Ed.2d 98, 91 S.Ct. 1563], the Supreme Court reversed a conviction under the City of Euclid's "suspicious person ordinance," which made it a crime for a "person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business . . . not [to] give satisfatory account of himself." The facts of the case were that "Palmer, in his car, was seen late at night in a parking lot. A female left his car and entered by the front door an adjoining apartment house. Palmer then pulled onto the street,

parked with his lights on, and used a two-way radio. He was not armed. He said he had just let off a friend. He was then arrested. At the station he gave three different addresses for himself and said he did not know his friend's name or where she was going when she left his car." (402 U.S. p. 545 [29 L.Ed.2d p. 100].) The court found the ordinance, as applied to Palmer's conduct, unconstitutionally vague, in that it did not give him reasonable notice that what he did was unlawful.

II

(2a) Section 647, subdivision (e) is attacked as vague, as incriminatory, and as arbitrary. We re-examine its validity in the light of the foregoing Supreme Court opinions.

1. Vagueness. The statute is asserted to be unconstitutionally vague. Yet under Terry v. Ohio (1968) supra, 392 U.S. 1, a peace officer is entitled to detain, frisk, and interrogate a person whose conduct raises a reasonable suspicion of criminal activity. The standard set out in Terry for the exercise of this authority is comparable to the one that brings section 647, subdivision (e) in play. Under Terry a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate (pp. 20-21 [20 L.Ed.2d pp. 905-906]). Under section 647, subdivision (e) a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification.

We see no essential difference between these two formulations. Each amounts to what Justice Harlan has termed "articulable suspicion less than probable cause." (Terry v. Ohio, p. 31 [20 L.Ed.2d p. 912], concurring opinion.) Neither is subject to the infirmity of vagueness. Both justify the limited intrusion of temporary detention, followed in the one case by frisk and in the other by request for identification. (Parenthetically we observe that frisk involves greater intrusion into personality than does request for indentification.)

Under section 647, subdivision (e) the person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification

must first be made. Nor does the statute lend itself to capricious enforcement, for it only becomes operative when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." The surrounding circumstances must be within the knowledge of the peace officer (People v. Bruno, 211 Cal. App.2d Supp. 855, 862 [27 Cal.Rptr. 458], and the reasonableness of the officer's belief in the threat to public safety is reviewable by an independent trier of fact.

Solomon argues that a peace officer's right to detain and ask questions on less than probable cause for arrest (Terry v. Ohio, supra, 392 U.S. 1) does not give him a constitutional right to require that the questions be

answered.[4/] To the extent that the questions pertain to identification we disagree. The Legislature is accorded the broadest possible discretion in enacting penal statutes (People v. Anderson, 6 Cal.3d 628, 640 [100 Cal. Rptr. 152, 493 P.2d 880]), and the courts merely determine whether a statute reasonably relates to a legitimate goverment purpose. (G & D Holland Construction Co. v. City of Marysville, 12 Cal.App.3d 989, 994 [91 Cal.Rptr. 227].) One such purpose is prevention and detection of crime. (3) It is

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4. Cf. Justice White's concurring opinion in Terry: ". . . I think an additional word is in order concerning the matter of interrogation during an investigative stop. . . . the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." (P. 34 [20 L.Ed.2d p. 913].)

within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional rights. (Cf. Pen. Code, § 148, Pen. Code, § 834a, resistance to arrest; Veh. Code, § 2800, failure to obey a traffic officer, Veh. Code, § 12951, subd. (b) and § 40302, refusal to present driver's license or other satisfactory evidence of identification on demand of a peace officer.) We find that the legislative power employed here to compel identification is consistent with constitutional right.

2. (2b) Incrimination.

Section 647, subdivision (e) is also challenged as a violation of the privilege against self-incrimination. The principal issue on this point is whether in the light of the foregoing Supreme

Court opinions the privilege against self-incrimination prohibits imposition on a suspected street loiterer of a duty to identify himself. In California v. Byers (1971) supra, 402 U.S. at pages 427-428 [29 L.Ed.2d at pages 16-17], the court spoke of "balancing the public need on the one hand, and the individual claim to constitutional protections on the other." With respect to the requirement of furnishing one's name and address the court said, at pages 431-432 [29 L.Ed.2d at page 19]: "Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the 'extravagant' extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. . . . Disclosure of name and address is an essentially

neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles."

At bench, the public need involved, protection of society against crime, is strong; while the individual right involved, anonymity when loitering on the streets under suspicious circumstances, is weak. We view the balance between identification and anonymity in the case of a loiterer on the streets under circumstances reasonably thought to involve the public safety as falling on the side of identification. Since the cause is here on demurrer we necessarily decide it on generalities, and the application of the statute to particular factual situations must await development, for, as the court observed

in Terry, "[e]ach case of this sort will, of course, have to be decided on its own facts." (P. 30 [20 L.Ed.2d p. 911].) We reaffirm our view that the statute's requirement of identification does not conflict with the privilege against self-incrimination.

Section 647, subdivision (e), however, in addition to its requirement of identification, purports to require the suspected street loiterer to account for his presence. At the time we decided Weger we thought the duty placed on the suspected street loiterer to account for his presence did not conflict with the privilege against self-incrimination because the privilege is one that must be claimed and until the privilege has been claimed it has not been violated. (8 Wigmore on Evidence (3d ed. 1961) § 2268, pp. 402-411.) In our former

view only after the suspected street loiterer claimed the privilege did he become excused from the statutory duty to account for his presence. Since then, however, the Supreme Court has ruled that the mere posing of questions in certain situations, as in the gambling, firearms, and marijuana tax cases, may intrude upon the privilege and render superfluous any need to claim the privilege. Of some tangential relevance is the requirement that a suspect be advised by his interrogator in advance of questioning about his privilege against self-incrimination and his right not to answer questions (Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 294, 86 S.Ct. 1602, 10 A.L.R.3d 974], and related cases). While Miranda advice is technically required only when cause for arrest appears, nevertheless, Miranda

has received an expansive interpretation (cf. Orozco v. Texas (1969) 394 U.S. 324 [22 L.Ed.2d 311, 89 S.Ct. 1095], and the current flows in the direction of excusing a person from furnishing any information to the authorities when he is suspected of wrongdoing. Since the existence of suspicious circumstances is a prerequisite to the applicability of section 647, subdivision (e), a duty placed on a suspected street loiterer to account for his presence may conflict with the privilege against self-incrimination of the Fifth Amendment.

In view of these constitutional developments we now construe section 647, subdivision (e) on a narrower basis than we did in our former opinion. Because we believe the aim of the statute is to require identification when the surrounding circumstances involve

the public safety, we construe the requirement of identification as primary and controlling, and we interpret the requirement account for his presence as wholly subordinate and adjunct to the requirement of identification, as operative only to the extent is assists in producing credible and reliable identification, for under current constitutional doctrine to require more might impinge upon the privilege against self-incrimination.

The literal text of section 647, subdivision (e) lends support to this construction. In describing the conditions under which the law becomes operative the statute refers to surrounding circumstances that suggest the public safety demands identification--not that it demands identification and accounting. Additionally, the statute

defines the crime of disorderly conduct as refusal to identify and account for presence, thus implying that conjunctive refusals are necessary in order to establish a violation of the statute. We construe these requirements as essentially unitary, and hold that section 647, subdivision (e) is fully satisfied by the production of reliable identification. On this point we conclude with the observation that duty to identify comprehends a genuine identification, one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself. On this aspect of identification, accounting for presence may continue to play an ancillary role of importance.

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3. Arbitrariness. Finally, it is claimed that section 647, subdivision (e) is invalid because it is susceptible to arbitrary enforcement.

It bears repetition that we are not dealing with the typical vagrancy statute that makes status a crime but with one that makes conduct a crime. The statute contains three elements: (1) refusal to furnish identity (2) by one loitering on the streets (3) under circumstances that infringe upon the public safety. Proof of each element is essential in order to establish a violation of the statute. In contrast, the ordinance in Papachristou v. City of Jacksonville, supra, 405 U.S. 156, created a crime whose sole element consisted of loitering on the streets, and the ordinance in Palmer v. City of Euclid, supra, 402 U.S. 544, while more

comprehensive than the Jacksonville ordinance in that it contained the element of refusal to account as well as the element of loitering, was susceptible to arbitrary adminsitration in that it lacked standards for its application. The California statute comes into operation only when surrounding circumstances suggest to a reasonable man some impairment of the public safety, and, as the court observed in Terry, such circumstances can be objectively defined and articulated. In our view the presence in the statute of this third element furnishes sufficient protection against arbitrary enforcement to make the statute constitutional.

Since we have construed duty to account for his presence as subordinate and adjunct to duty to furnish identification, questions involving the

satisfactoriness of the account given a peace officer by a suspected street loiterer and questions involving the standards a peace officer must use in evaulating the account given to him do not arise. Once a person has furnished suitable identification he has satisfied the statute, and he may not be arrested or prosecuted for failure to account for his presence or failure to give a satisfactory or even plausible account to the interrogating peace officer.

As construed section 647, subdivision (e) withstands constitutional challenge. The judgment of the municipal court dismissing the complaint is reversed.

Roth, P. J., and Compton, J., concurred.

Respondent's petition for a hearing by the Supreme Court was denied

October 11, 1973. Tobriner, J., and Mosk, J., were of the opinion that the petition should be granted.

* * *

Appendix C

Filed September 10, 1979

MEMORANDUM OPINION
In re Edward C. Lawson v.
William Kolender, et. al.,
Civil No. 77-0213-N

On June 1, 1977, this Court ruled that Cal. Pen. Code § 647(e) was not unconstitutionally vague or overbroad. That ruling was based largely on the limiting interpretation the California Court of Appeal had given the section in People v. Solomon, 33 Cal.App.3d 429 (1973). Now, however, language in recent United States Supreme Court decisions evaluating statutes similar to § 647(e) convinces the Court that the earlier ruling should be reconsidered, and the findings of fact, conclusions of law and judgment signed and filed on June 1, 1977 are now vacated.

In Michigan v. DeFillippo, ___ U.S. ___, 47 U.S.L.W. 4805 (1979),

the Supreme Court had before it a "stop-and-identify" ordinance similar to the California statute.* A suspect refused to identify himself properly and was arrested and searched incident to that

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* Cal. Pen. Code § 647(e) provides that: "every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

"(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The Detroit ordinance provides:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such indentification . . ." .

arrest. Contraband was discovered and defendant contended the evidence had to be suppressed because the stop-and-identify statute was unconstitutional. The Michigan Court of Appeals agreed, holding the ordinance void for vagueness and overbreadth, and reasoned therefore that the evidence had to be suppressed. People v. DeFillippo, 80 Mich.App. 197, 262 N.W.2d (1977), rev'd 47 U.S.L.W. 4805 (1979).

The Supreme Court reversed on the basis that the search had been conducted in the good faith belief that the arrest was lawful; however, it did not find the ordinance constitutional but assumed that it was defective. Three justices dissented, noting that the statute was "indeed unconstitutional and patently so." 47 U.S.L.W. at 4809 (Brennan, J., dissenting). They

concluded, as had the Michigan Court, that while Terry v. Ohio, 392 U.S. 1 (1968), permits a brief detention when there are facts amounting to a "reasonable suspicion," anyone so detained cannot be required to answer questions and "refusal to answer furnishes no basis for an arrest." 47 U.S.L.W. 15 4809, quoting from White, J., concurring in Terry.

Section 647(e) permits Terry type detentions and makes it a crime to refuse to "account for one's presence when requested by any peace officer so to do. . . ". This latter feature attempts to make innocent activity unlawful, (See Papachristou v. City of Jacksonville, 405 U.S. 166 (1972), and this overbreadth requires that the section be declared unconstitutional.

This Court's reconsideration of its earlier ruling is not compelled by DeFillippo, supra, or the companion case of Brown v. Texas, ____ U.S. ____, 47 U.S.L.W. 4810 (1979). Neither of those cases reached the constitutional issues raised by the stop-and-identify statutes; in fact, in Brown, supra, the Supreme Court expressly noted that it was not deciding the question. 47 U.S.L.W. 4811 n.3.

Nonetheless, those decisions shed new light on the issue, and this Court now concludes, in accordance with the dissenters in DeFillippo and with Justice White's concurring opinion in Terry, supra, that a person who is stopped on less than probable cause cannot be punished for failing to identify himself.

This Court therefore finds that Cal. Pen. Code § 647(e) is unconstitutionally overbroad, and defendants William Kolender, in his capacity of Chief of Police of the City of San Diego, John Duffy, in his capacity as Sheriff of San Diego County, William J. Winters, in his capacity as Chief of Police of the City of Chula Vista, and H. A. Porrazzo, in his capacity as Deputy Chief Commander of California Highway Patrol, and all of their agents, specifically including the named defendants are enjoined from enforcing or attempting to enforce the provisions of said section.

This action came on for trial on March 21, 22 and 23, 1979, on the remaining allegations in the complaint other than Count I. Plaintiff appeared in pro per; John Woods, Deputy City Attorney, appeared for the City

defendants; Robert Rice, Deputy County Counsel, appered for County defendants; Craig Higgs, Esq., of Higgs, Fletcher & Mack, appeared for the Chula Vista defendants; and Karl Phaler, Deputy Attorney General, appeared for the California Highway Patrol defendants.

The Court, having heard and considered the evidence, both oral and documentary, and the arguments of all concerned, finds that each individual defendant contacted and/or arrested the plaintiff in the good faith belief that said contact and/or arrest was lawful. Therefore, the Court concludes from the above findings of fact that the plaintiff is not entitled to money damages against any defendant as a result of his actions.

This memorandum decision shall stand as the findings of fact

and conclusions of law under Rule 52(a), Fed. R. Civ. Pro.

LELAND C. NIELSEN

UNITED STATES DISTRICT COURT

For The

Southern District of California

Entered September 11, 1979

EDWARD C. LAWSON	)	Civil Action File
	)	No. 77-0213-N
vs.	)	
	)	JUDGMENT
CITY OF SAN DIEGO, ET AL	)	
	)	

This action came on for trial before the Court, Honorable Leland C. Nielsen, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the findings of fact, conclusions of law and judgment signed and filed on June 1, 1977 are now vacated. It is further ordered and adjudged that each individual defendant contacted and/or arrested the plaintiff in the good faith

belief that said contact and/or arrest was lawful. Therefore, the Court concludes from the findings of fact dated and filed September 10, 1979 and entered on September 11, 1979, that the plaintiff is not entitled to money damages against any defendant as a result of his actions.

Dated at San Diego, California, this 11th day of September, 1979.

WILLIAM W. LUDDY
Clerk of Court

By: S. CHRISTENSEN
Deputy Clerk

Appendix D

Received November 13, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff-Appellee, v. H. A. PORAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol, JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al., Defendants-Appellants, and WILLIAM KOLENDER, in his capacity as Chief of Police of San Diego, et al., Defendant.	Nos. 79-3629 79-3633 79-3641 79-3685 (Consolidated)

MOTION TO STAY OR RECALL AND STAY OF MANDATE

Pursuant to the provisions of rule 41(b) of the Federal Rules of Appellate Procedure and rule 17 of the rules of this Court, H. A. Porazzo, appellant above named, hereby moves the Court to extend the time for issuing the mandate to January 14, 1982. In the event the mandate has already issued, appellant asks this Court to recall the mandate and stay reissuance for the same period of time.

Such an extension of time is necessary for the following reasons:

1. On November 13, 1981, appellants Porazzo and Duffy filed notice of appeal with this Court.

2. A request for the United States Supreme Court to note jurisdiction of this matter will be filed within the time set forth in

rule 12(1) of the Supreme Court Rules. (See also, 28 U.S.C. 2101(c).

3. As noted by this Court in the opinion issued in this matter October 15, 1981 (slip opn. p. 5210) whether requiring a person to provide reliable identification when requested by a police officer violates the Fourth Amendment was a question specifically left open by the Supreme Court's decision in Brown v. Texas (1979) 443 U.S. 47, 53, fn. 3.

4. The Supreme Court denied certiorari (415 U.S. 951) in People v. Solomon (1973) 33 Cal.App.3d 429 (hearing den.) in which California Penal Code section, 647, subdivision (e) was held constitutional in an opinion where each specific holding by this Court

was ruled upon with diametrically opposite results.

5. The opinion of this Court directed a retrial on the issue of good faith reliance by the police, and, should the Supreme Court note jurisdiction, the retrial would be unnecessary, thus saving court time and resources of the parties.[1/]

6. The enforcement of penal laws should be uniform and absent the stay requested, should the Supreme Court note jurisdiction, the California Penal Code statute 647, subdivision (e) would not be enforced for a brief period of time pending disposition of the appeal. It would create more uniform law

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1. It should be noted Mr. Lawson is not in custody since this action stems from a civil rights suit. (42 U.S.C. 1983.)

enforcement and provide the California Legislature an opportunity to make changes (should the Supreme Court indicate any are necessary) if this stay were granted until the matter is finally resolved.

WHEREFORE appellant H.A. PORAZZO respectfully requests that this motion be granted and the time

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for issuing the mandate in the above entitled appeal be extended to and including January 14, 1982.

Dated: November 12, 1981.

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

MICHAEL D. WELLINGTON,
Deputy Attorney General

A. WELLS PETERSEN,
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Attorneys for Defendants/Appellants
JOHN DUFFY, J. O. LARSON,
JAMES E. MOULTON and
ANGEL SANCHEZ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff/Appellee, v. WILLIAM KOLENDER, etc., et al., Defendants/Appellants, JOHN DUFFY, etc. et al., Defendants/Appellants,	Nos. 79-3629 79-3633 79-3641 79-3685 (Consolidated) MOTION TO STAY, OR TO RECALL AND STAY, ISSUANCE OF MANDATE

Defendants/Appellants JOHN DUFFY, J. O. LARSON, JAMES E. MOULTON and ANGEL SANCHEZ hereby join with Defendants/Appellant H., A. PORAZZO in

his Motion to Stay or Recall and Stay of Mandate filed herein on November 12, 1981.

DATED: November 24, 1981.

STOCKDALE, PECKHAM, & ESTES

By: PAUL F. SOWA, Attorneys for Defendants/Appellants, JOHN DUFFY, J. O. LARSON, JAMES E. MOULTON and ANGEL SANCHEZ

Appendix E

Filed December 8, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff-Appellee, v. WILLIAM KOLENDER, in his capacity as Chief of Police of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al., Defendants, and H. A. PORAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol, Defendant-Appellant.	No. 79-3629 DC No. CV77-0213 LCN (Southern California) O R D E R

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Before: FERGUSON and BOOCHEVER, Circuit Judges and REDDEN,* District Judge

The appellant's motion to recall the mandate is granted. The issuance of the mandate is stayed pending final disposition of the appeal to the Supreme Court of the United States.

BY ORDER OF THE COURT:

[signed]

Christopher W. Vasil
Acting Clerk of Court

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*The Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

Appendix F

Received November 13, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff-Appellee, v. H. A. PORAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol, JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al., Defendants-Appellants, and WILLIAM KOLENDER, in his capacity as Chief of Police of San Diego, et al., Defendant.	Nos. 79-3629 79-3633 79-3641 79-3685 (Consolidated)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that H. A. PORAZZO and JOHN DUFFY, defendants and appellants in this matter, hereby appeal to the Supreme Court of the United States from the decision of this Court, affirming the judgment of the District Court for the Southern District of California, entered on October 15, 1981.

This appeal is taken pursuant to 28 United States Code, section 1254(2).

Dated: November 10, 1981.

[signed]

A. WELLS PETERSEN
Deputy Attorney General
Counsel for Appellant
H. A. Porazzo, et al.

[signed]

PAUL SOWA, Esq.
Counsel for Appellant
John Duffy, et al.

Appendix G

California Penal Code section 647, subdivision (e).

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands such identification.

81-1320

Appendix H

Filed November 23, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff/Appellee, v. WILLIAM KOLENDER, etc., et al., Defendants/ Appellants, H. A. PORAZZO, etc., et al., Defendants/ Appellants.	NOS. 79-3629, 79-3633, 79-3641, 79-3685 (Consolidated) NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that W. KOLENDER, T. W. SWAIM, C. R. WEBB, P. A. CHAMPION, A. A. ATKINS, A. J. RUBIN and C. D. ZIMMERMAN, defendants/appellants in this matter, hereby appeal to the Supreme Court of the United States from the decision of this Court affirming in

part, and reversing in part, the judgment of the District Court of the Southern District of California entered on October 15, 1981. This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

Dated: November 20, 1981.

JOHN W. WITT, City Attorney
By [John W. Wood, Deputy]

Appendix I

Filed December 2, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD LARSON, Plaintiff/Appellee, v. WILLIAM KOLENDER, etc., et al., Defendants/ Appellants, JOHN DUFFY, etc., et al., Defendants/ Appellants.	)))

part and reversing in part the judgment of the United States District Court for this Southern District of California. This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated: November 24, 1981.

STOCKDALE, PECKHAM & ESTES
By PAUL F. SOWA

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY,
H. A. PORAZZO, T. W. SWAIM,
C. R. WEBB, P. A. CHAMPION,
A. A. ATKINS, A. J. RUBIN,
C. D. ZIMMERMAN, J. O. LARSON,
JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JANUARY 13, 1982
PROBABLE JURISDICTION NOTED MARCH 8, 1982

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JOINT APPENDIX

	Pages
Docket Entries	JA 1 - 8
First Amended Complaint (First Claim only)	JA 9 - 23
Findings of Fact and Conclusions of Law	JA 24 - 27
Judgment of June 1, 1977	JA 28 - 30

RELEVANT MATERIAL APPEARING IN JURISDICTIONAL STATEMENT APPENDIX

Ninth Circuit Opinion	A 1 - 44
State District Court of Appeal Opinion (People v. Solomon 33 Cal.App.3d 429)	A 45 - 73
District Court Memorandum Opinion	A 74 - 83
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Notices of Appeal	A 94 - 95 A 97 -100
California Penal Code section 647, subdivision (e)	A 96

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOCKET ENTRIES

In re Edward C. Lawson
William Kolender, et al.
Civil No. 77-0213-N

Date	NR.	Proceedings
3-31-77	1	Fld. complt. for declaratory & injunctive relief & damages. & demand for J/T. JS-5 Fld. request & order for service by other than the U.S. Marshal. Issd. summons.
		* * * * * * *
5-3-77	8	Fld. notice of mot. & mot. for S/J by deft. State of Cal., pts. & auths. in support. Ntc. for 5-16-77 at 10:30 a.m.
5-5-77	9	Fld. stip: granting SD County's mot. to dismiss & pltff may file an amended complt. (N)
5-9-77	10	Fld. pltff. FIRST AMENDED COMPLT.

Date	NR.	Proceedings
5-10-77	11	Fld. plts. pts. & auths. in opposition to mot. for S/J
		* * * * * * *
6-1-77	18	Fld. findings of fact & conclusions of law w/ord. thereon. (N)
6-1-77	19	Fld. judgment w/ord. that partial S.J. is granted - The claims for dec. judgment & injunctive relief set forth in paragraphs 1-9 of the first amended complt. (N) (Ent. 6-1-77)
		* * * * * * *
6-7-77	22	Fld. Pltfs. Notice of Appeal from judgment ent. 6-1-77
		* * * * * * *
6-14-77	25	Fld. deft. John Duffy's Larson, Sanchez & Moulton's ANSWER to first amended complt.

Date	NR.	Proceedings
6-14-77 (cont.)	25	for dec. relief & damages, t/w affid. of serv.
6-14-77	26	Fld. deft. Kinslow's ANSWER to complt. t/w affid. of serv.
6-15-77	27	Fld. deft. Kolender, Swaim, Rubin, Atkins, Champion, Zimmerman & Webb's ANSWER to first amended complt. & demand for jury trial t/w affid. of serv.
		* * * * * * *
10-7-77	32	Fld. deft. Winters, Villalpando, & Strickland, & Caplenor, answer to first amended complaint t/w declaration of service by mail.
		* * * * * * *
10-21-77	34	Fld. deft. Kolender, Swaim, Rubin, Atkins, Champion, Zimmerman & Webb not. of taking depo of Edward Lawson

Date	NR.	Proceedings
10-21-77 (cont.)	34	on 11-16-77 at 202 "C" St., San Diego, Ca. at 10:00 am. t/w affd. of serv.
11-3-77	35	Fld. deft. Duffy, Lawson Moulton & Sanchez notice of taking depo. of Edward Lawson on 11-16-77 at 1:30 pm. at office of City Atty, City Admin Bldg t/w declar. of serv.
		* * * * * * *
2-6-78	46	Fld. c.c. jdgmt. of USCA of dismissing appeal. (Ent. 2-6-78).
		* * * * * * *
3-21-79	--	Before Trial - Pltf. mot. to cont trial - denied; C/T 1ST DAY - Swore wits; fld exhibits; Ent. ord. - deft. mot. to dismiss as to deft. Rubin - granted; Cont'd for furth. C/T to 3-22-79 at 9 am.

Date	NR.	Proceedings
3-22-79	--	C/T - 2nd DAY - Swore wits.; Fld. exhibits; Ent ord - Cont'd for further C/T to 3-23-79 at 9 am.
3-23-79	--	CT 3rd DAY - submitted. (N)
9-10-79	59	Fld. memo opinion (N) Ent 9-11-79 Mld cys.
9-10-79	60	Fld. judgment on decision by the court that the findings of fact, conclusions of law and judgment signed and filed on June 1, 1977 are now vacated. It is further ordered and adjudged that each individual deft. contacted and/or arrested the pltf. in the good faith belief that said contact and/or arrest was lawful. Therefore, the Court concludes from the findings of fact dated and filed 9-10-79

Date	NR.	Proceedings
9-10-79 (cont.)	60	and entered on 9-11-79, that the pltf. is not entitled to money damages against any deft. as a result of his actions. (DCLK) ENT. 9-11-79 Mld. cys. (JS-6).
		* * * * * * *
9-13-79	62	Fld. judgment that the defts, their officers, agents and employees are restrained from interfering with the pltf's right to travel to and from the public highways. It is further order, adjudged and decreed that the defts, their officers, agents and employees are permanently enjoined and restrained from enforcing the provisions of Section 674(e) of the California Penal Code.

Date	NR.	Proceedings
9-13-79 (cont)	62	Plft. is awarded costs of suit. (N) ENT 9-13-79 Mld cys.
		* * * * * * *
9-28-79	66	Fld. NOTICE of APPEAL as to jdgmt. entered on 9-11-79 Mld notice for filing designation of repts. trans. Mld. notice of payment of dkt fee to USCA.
		* * * * * * *
10-11-79	69	Fld. NOTICE OF APPEAL as to jdgmt entered 9-11-79, (by pltf). Mld. notice re dkt. fee payment to USCA not paid. Mld. notice for filing desig of repts trans.
		* * * * * * *
10-12-79	72	Fld. AMENDED NOTICE OF APPEAL as to jdgmt. entered 9-13-79 by defts. Kolender, Swaim, Webb,
		* * * * * * *

Date	NR.	Proceedings
10-12-79 (Cont.)	72	Champion, Atkins, Rubin & Zimmerman.
		* * * * * * *
10-12-79	75	Fld NOTICE OF APPEAL as to jdgmt. entered 9-13-79 by defts. John Duffy, J.O. Larson, Angel Sanchez & James E. Moulton.
		* * * * * * *
10-15-79	76	Fld AMENDED NOTICE OF APPEAL as to jdgmt. entered 9-13-79 by deft. Porazzo.
		* * * * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD LAWSON, Plaintiff, v. WILLIAM KOLANDER, in his capacity as Chief of Police of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his capacity as Chief of Police of the City of Chula Vista, H. A. PORRAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol, J. O. LARSON, T. W. SWAN, PAUL VILLALPANDO, C.D. STRICKLAND, MICHAEL CAPLENOR, E. R. KINSLOW, OFFICER SANCHEZ, A.J. RUBIN, A. A. ATKIN, K. A. CHAMPION, JAMES E. MOULTON, C. D. ZIMMERMAN, and C. R. WEBB, Defendants.	No. 77-0213-N Filed May 9, 1977

FIRST AMENDED COMPLAINT

FIRST CLAIM AGAINST WILLIAM KOLENDER, in his capacity as Chief of

Police of the City of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his capacity as Chief of Police of the City of Chula Vista and H. A. PORRAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol.

1. Plaintiff is a resident of the City of San Francisco, State of California. From time to time, while pursuing his lawful business, plaintiff has reason to and does visit the City and County of San Diego and the City of Chula Vista, all in the State of California.

2. Defendant WILLIAM KOLENDER is the Chief of Police of the City of San Diego and is sued herein in that capacity. As said Chief of Police, said defendant directs the activities of diverse persons

in enforcing the laws of the State of California in said city. Defendants SWAN, RUBIN, ATKIN, CHAMPION, ZIMMERMAN and WEBB are under the control and supervision of defendant KOLANDER.

3. Defendant JOHN DUFFY is the Sheriff of San Diego County and is sued herein in that capacity. As said Sheriff, said defendant directs the activities of diverse persons in enforcing the laws of the State of California within said county and said defendant also maintains and controls the jail of said county. Defendants LARSON, SANCHEZ and MOULTON are under the control and supervision of defendant DUFFY.

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4. Defendant WILLIAM J. WINTERS is the Chief of Police of the City of Chula Vista and is sued herein in that capacity. As said Chief of Police, said defendant directs the activities of diverse persons in enforcing the laws of the State of California in said City. Defendants VILLALPANDO, STRICKLAND and CAPLENOR are under the control and supervision of defendant WINTERS.

5. Defendant H. A. PORRAZZO is a Deputy Chief Commander of the California Highway Patrol and supervisor for the San Diego County area. Said California Highway Patrol employs diverse persons active in the prosecution of criminal offenses in the Southern District of California and is sued herein in that capacity. As said supervisor, said defendant directs the activities of said diverse persons in prosecuting said criminal defenses. Defendant KINSLOW is under

the control and supervision of defendant PORRAZZO.

6. This action is for declaratory judgment pursuant to 28 USC, section 2201 for the purpose of determining a question of actual controvery between the parties as hereinafter more fully appears, and for injunctive relief pursuant to 28 USC, section 2281 against enforcement of a statute hereinafter set forth. The jurisdiction of this court is invoked pursuant to 28 USC, section 1343(3) and 42 USC, section 1983.

7. On no less than fifteen occasions since January 1975, plaintiff has been illegally and wrongfully stopped by a police officer supervised by one of the defendants herein. On each such occasion, the said police officer purported to detain plaintiff pursuant to California Penal Code, section 647(e). The specific illegal acts by said police officers

are as follows:

a. March 8, 1975. Plaintiff was accosted at 11:45 p.m., by police officer J. O. LARSON, # 653, an employee of the COUNTY OF SAN DIEGO and under the supervision of defendant DUFFY. Plaintiff was arrested and lodged in county jail. Plaintiff was prosecuted by an employee of the COUNTY OF SAN DIEGO, acting under the color of law.

b. March 15, 1975. Plaintiff, while peacefully eating in a restaurant at or about 5:48 p.m., was accosted by police officer T. W. SWAN, # 313, car # 335, an employee of the CITY OF SAN DIEGO and under the supervision of defendant KOLANDER or his predecessor in office. Said police officer alleged he was seeking a one-legged white man. Plaintiff is black with all of his extremities intact.

c. April 16, 1975. Plaintiff was

accosted at 9:30 a.m. by police officer PAUL VILLALPANDO, # 69, car #7, an employee of the CITY OF CHULA VISTA under the supervision of defendant WINTERS. Plaintiff was detained and released.

d. May 28, 1975. Plaintiff was accosted and detained at 10:30 p.m. by police officer STRICKLAND, # 10, car #5, an employee of the CITY OF CHULA VISTA and supervised by defendant WINTERS. Said police officer alleged plaintiff looked like a murder suspect.

e. January 25, 1976. Plaintiff was arrested at 4 a.m. by police officer MICHAEL CAPLENOR, # 124, an employee of the CITY OF CHULA VISTA and under the supervision of defendant WINTERS. Plaintiff was prosecuted by Deputy District Attorney, ERNEST MARUGG, an employee of the COUNTY OF SAN DIEGO, acting under the color of law. The charges were ultimately dismissed on the Court's own motion.

f. February 15, 1976. Plaintiff was accosted and arrested by police officer E. R. KINSLOW, an employee of the STATE OF CALIFORNIA, while acting under the supervision of defendant PORRAZZO, within the geographical limits of the CITY OF CHULA VISTA. Plaintiff was incarcerated until the following day when he was released without charge.

g. February 16, 1976. Plaintiff was accosted and interrogated by an unknown deputy sheriff employee of the COUNTY OF SAN DIEGO acting under the supervision of defendant DUFFY. Plaintiff was released after interrogation.

h. March 22, 1976. Plaintiff was accosted and detained by police officer SANCHEZ, an employee of the COUNTY OF SAN DIEGO acting under the supervision of defendant DUFFY, within the geographical limits of the CITY OF CHULA VISTA.

Plaintiff was released after interrogation.

i. April 1, 1976. Plaintiff was arrested at or about 3 a.m. by police officer A. J. RUBIN, # 1828, am employee of the CITY OF SAN DIEGO while acting under the supervision of defendant KOLENDER or his predecessor in interest. Plaintiff was prosecuted by Deputy City Attorney EDMUND JAWORSKI an employee of the CITY OF SAN DIEGO acting under color of law. During portion of this this [sic] proceeding, plaintiff was incarcerated in the San Diego County Jail, an institution maintained by the COUNTY OF SAN DIEGO and controlled by defendant DUFFY. Plaintiff was convicted of said charge on May 17, 1976. The court suspended imposition of sentence for a period of three years on condition that (1) plaintiff have no violations involving Penal Code, section 647(e); (2) Plaintiff completely, promptly and

effectively identify himself to any police officer in San Diego County who asks his name; plaintiff will not decide whether he should or shouldn't; and (3) plaintiff to spend 15 days in the custody of defendant DUFFY and to be committed forthwith. Appeal was taken and the conviction affirmed by the Appellate Department of the Superior Court on February 11, 1977. This affirmation exhausted plaintiff's right to appeal.

j. April 16, 1976. Plaintiff was arrested by police officer A. A. ATKIN, police ambulance # 417, an employee of the CITY OF SAN DIEGO and acting under the supervision of defendant KOLANDER or his predecessor in office. Plaintiff was transported to the police station and detained. Plaintiff was eventually released without charge.

k. May 27, 1976. Plaintiff was

accosted and interrogated at 9:45 a.m. by police officer K. A. CHAMPION, # 186, an employee of the CITY OF SAN DIEGO and acting under the supervision of defendnt DUFFY. Plaintiff was eventually released.

m. January 24, 1977. Plaintiff was accosted and interrogated by police officer ZIMMERMAN, car #116, an employee of the CITY OF SAN DIEGO and under the supervision of defendant KOLANDER. Said employee was assisted by several additional police officer employees of the CITY OF SAN DIEGO also under the supervision of defendant KOLANDER. The badge number of one such employee was 1294. Plaintiff was released after approximately ten minutes of interrogation. As plaintiff continued on his way, he was subjected to repeated epithets and racial slurs directed at him by said police officers.

n. January 25, 1977. Plaintiff was arrested at 3 p.m. in front of his place of abode by police officer C. R. WEBB, # 1149, car #803, an employee of the CITY OF SAN DIEGO and under the supervision of defendant KOLANDER. Plaintiff was detained in a patrol car for some fifteen minutes and released.

o. January 29, 1977. Plaintiff was accosted and interrogated at 7 p.m. by D. W. ALLEN, # 574, car # 816p, an employee of the CITY OF SAN DIEGO and under the supervision of defendant KOLANDER. Plaintiff was released after five minutes of interrogation.

8. On each of the aforementioned occasions, plaintiff was detained or arrested under the provisions of California Penal Code, section 647(e), which reads as follows:

> "Every person who commits any of the following acts is guilty

> of disorderly conduct, a misdemeanor:
>
> ". . .
>
> "(e) Who loiters or wanders upon the streets or from place to place without apparrent reason or busines and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

Said statute has been consistently upheld as constitutional by the state courts of California. It has consistently been held unconstitutional by the federal court.

9. There is now existing between the parties hereto an actual, justifiable controversy in respect to which plaintiff is entitled to have a declaration of his rights and further relief, including a mandatory injunction because of the facts, conditions, and circumstances hereinbefore set out.

the facts, conditions, and circumstances hereinbefore set out.

* * * * * * *

WHEREFORE, plaintiff prays:

On the First Claim against defendants WILLIAM KOLANDER in his official capacity as Chief of Police of San Diego, JOHN DUFFY in his official capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his official capacity as Chief of Police of Chula Vista, and H. A. PORRAZZO, in his official capacity as Deputy Chief Commander of the California Highway Patrol;

1. The court enter a declaratory judgment declaring that California Penal Code, section 647(e) is unconstitutional and unenforceable;

2. The court issue a mandatory injunction restraining defendants, their officers, agents and employees from

interfering with plaintiff's right to travel to and fro on the public highways and to enjoin the enforcement of California Penal Code, section 647(e); and

3. The court grant such other relief as it deems appropriate.

* * * * * * *

May 9, 1977

/s/ ROBERT H. LYNN
ROBERT H. LYNN
Attorney for Plaintiff

[Affidavit of Service omitted in printing.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD LAWSON, Plaintiff v. WILLIAM KOLANDER, in his capacity as Chief of Police of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his capacity as Chief of Police of the City of Chula Vista, H.A. PORRAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol, J. O. LARSON, T. W. SWAN, PAUL VILLALPANDO, C. D. STRICKLAND, MICHAEL CAPLENOR, E. R. KINSLOW, OFFICER SANCHEZ, A. J. RUBIN, A. A. ATKIN, K. A. CHAMPION, JAMES E. MOULTON, C. D. ZIMMERMAN, and C. R. WEBB, Defendants.	Civil Case No. 77-0213-N (Filed June 1, 1977) FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

FINDINGS OF FACT

1. California Penal Code section 647(e) defines disorderly conduct as

including (a) loitering and wandering on the streets without apparent reason or business, (b) in circumstances such as to indicate to a reasonable man that the public safety demands identification, (c) refusing to identify one's self and to account for one's presence when requested to do so by a peace officer.

2. This statute has been construed by the appellate courts of California.

3. As so construed, "loitering" includes lingering in designated places for the purpose of committing a crime, but excludes waiting for a lawful purpose.

4. As construed by state courts, circumstances such as the public safety requires identification are those circumstances which would authorize an investigative detention. These circumstances must be articulable objective facts within the knowledge of the peace officer.

5. As construed by state courts, one who provides identification need not account for his presence.

II

CONCLUSIONS OF LAW

1. California Penal Code section 647(e) must be read in light of the state court constructions.

2. The circumstances in which a detention and request for identification may be made are only those in which articulable objective facts give rise to a founded suspicion sufficient to support an investigative stop and inquiry.

3. In these circumstances the State of California may constitutionally require identification.

4. The requirement for identification in described circumstances is not void for vagueness.

5. Because the request for identification may be made only with reference to specific articulable facts, the statute does not lend itself to capricious enforcement.

6. Because the statute is satisfied when identification is presented, the statute does not infringe upon Fifth Amendment Rights.

7. Accordingly, California Penal Code section 647(e), as construed by the courts of California, is constitutional.

DATED: 6-1-77.

/s/ LELAND C. NIELSEN

LELAND C. NIELSEN, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
CALIFORNIA

KJP:mg
5/27-77
SD77CV0114

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD LAWSON, Plaintiff v. WILLIAM KOLANDER, in his capacity as Chief of Police of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his capacity as Chief of Police of the City of Chula Vista, H. A. PORRAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol, J. O. LARSON, T. W. SWAN, PAUL VILLALPANDO, C. D. STRICKLAND, MICHAEL CAPLENOR, E. R. KINSLOW, OFFICER SANCHEZ, A. J. RUBIN, A. A. ATKIN, K. A. CHAMPION, JAMES E. MOULTON, C. D. ZIMMERMAN, and C. R. WEBB, Defendants.	Civil Case No. 77-0213-N (Filed 6-1-77) JUDGMENT

Defendant Porrazzo's motion to dismiss in the above matter having come on for hearing on May 16, 1977, before the Honorable Leland C. Nielsen, Judge Presiding of the above entitled court, plaintiff

appearing by his counsel, Robert H. Lynn, Esquire, and defendant appearing by his counsel, Evelle J. Younger, Attorney General of the State of California, by Karl J. Phaler, Deputy Attorney General, the Court having read all the papers on file in the action, the matter having been orally argued and submitted, and the Court having given notice to all parties of its intended decision at the time of the aforementioned hearing and the Court being fully informed in the action, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Partial summary judgment is granted. The claims for declaratory judgment and

/

/

/

injunctive relief set forth in paragraphs 1 through 9 of the first amended complaint are dismissed.

DATED: 6-1-77.

/s/ LELAND C. NIELSEN

LELAND C. NIELSEN, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KJP:em
5/27/77
SD77CV0114

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No. 81-1320

WILLIAM KOLENDER, et al.,
Appellants,

v.

EDWARD LAWSON,
Appellee.

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss,

I, Clifford Reed, being duly sworn, depose and say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within mentioned mailing occurred and not a party to the subject cause: my business address is 110 West "A" Street, Suite 700, San Diego, California 92101.

I served three copies of the Joint Appendix (on Appeal from the United States Court of Appeals, Ninth Circuit) on the following by placing same in envelopes addressed as follows:

Clerk, U.S. Court of Appeals
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Each envelope was then sealed and with the postage prepared deposited in the United States mail by me at San Diego, California on the 8 day of July, 1982.

There is delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California July 8, 1982.

Clifford Reed

Subscribed and sworn to before me this 8th day of July, 1982.

Notary Public in and for
said County and State

KAREN K. LUIS
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 02, 1984

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1320

IN THE
Supreme Court of the United States

October Term 1981

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, et al., JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al.,

Defendants-Appellants,

and

H. A. PORAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol, et al.,

Defendants-Appellants,

v.

EDWARD LAWSON,

Plaintiff-Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

MOTION TO AFFIRM JUDGMENT

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QUESTIONS PRESENTED

1. Whether appellant's contentions merit plenary consideration?

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No. 81-1320

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1981

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, et al., JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al.,

Defendants-Appellants,

and

H. A. PORAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol, et al.,

Defendants-Appellants,

v.

EDWARD LAWSON,

Plaintiff-Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

MOTION TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee moves that the judgment of the Court of Appeals be affirmed.

JURISDICTION

This is a direct appeal from a final judgment of the Ninth Circuit Court of Appeals. The decision of the Ninth Circuit was issued October 15, 1981 (J.S. 4) and notices of appeal were filed on November 13, 1981, and

November 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(2).

STATUTE INVOLVED

The statute involved is California Penal Code, § 647(e) set out in the Jurisdictional Statement at page 7.

STATEMENT OF THE CASE

Contrary to the opinion of the Attorney General of California (J.S. 7), this is not a criminal appeal. On March 31, 1977, Appellee Edward Lawson filed a complaint seeking declaratory and injunctive relief under 42 U.S.C., § 1983. The complaint was based on fifteen detentions of plaintiff by law enforcement officials between March, 1975, and January, 1977. On each occasion, he was detained or arrested on the basis of California Penal Code, § 647(e). Lawson was prosecuted only twice for the alleged offenses; one resulting in dismissal, the other in conviction. Ninth Circuit Opinion, J.S. App. "A", A-3.

Following a trial in March, 1979, the case was submitted and on September 10, 1979, the District Court issued a memorandum opinion declaring section 647(e) unconstitutional and enjoining its enforcement by appellants. J.S. App. "C", A-74. On October 1[illegible] 1981, the Ninth Circuit affirmed the District Court for the reasons stated in the opinion. J.S. App. "A", A-1. This appeal followed.

ARGUMENT

Appellants' contentions do not merit plenary consideration for the following reasons:

1. The Ninth Circuit, in its well reasoned opinion, found three infirmities in the statute, to wit:

A. It violates the fourth amendment proscription against searches and seizures in that (1) it allows an arrest on less than probable cause to support a substantive crime *and* (2) it seriously intrudes on personal freedom. J.S., App. "A", A-13, A-17-18.

B. It contains a vague enforcement standard which is susceptible to arbitrary enforcement since (1) it provides no standards for determining whether a person is engaged in suspicious loitering and (2) it fails to specify what forms of identification satisfy the statute. J.S., App. "A", A-13, A-30-31.

C. It fails to give fair and adequate notice of the type of conduct prohibited, in that an innocent person cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore can not know when refusal to identify himself will be a crime. J.S., App. "A", A-13, A-36.

2. The questions presented by appellants are rather esoteric in that they attack some of the reasoning behind the Circuit Court's opinion without any direct reference to the holdings themselves. However, it is not necessary to attempt to match the points raised by appellants to specific rulings by the Circuit Court since the points themselves are erroneous and do not show error by the Court below, to wit:

A. California police must possess valid articulable facts before detaining citizens under the statute. J.S. 10.

This is true, but it does not carry the definition far enought. In order to *validly* detain a citizen, an officer must possess articulable facts that (1) criminal activity is afoot and (2) that this particular citizen has some connection thereto. *Brown v. Texas*, 443 U.S. 47, 51; *Terry v. Ohio*, 392 U.S. 1. An articulable fact used to detain does not amount to probable cause to arrest. The fourth amendment speaks to probable cause, not reasonable suspicion. The limited *Terry* exception requires a reasonable

belief that criminal activity is afoot. Appellants assertion that *Solomon* equates this statute to *Terry* circumstances [J.D. 13] is plainly not true. See J.S., App. "A", A-16, n. 9. Appellants further contend that the Ninth Circuit had no jurisdiction to question the California Court of Appeal interpretation of the Federal Constitution. This is plain error. *Wooley v. Maynard*, 430 U.S. 705. Appellants also contend that a policeman "should not be denied the right to ask [for] identification. . . ." J.S., 13. Nobody has ever questioned that policeman's right to ask. It is the citizen's obligation to answer that is in issue.

B. The Statute provides for fair notice, J.S. 20.

Appellants argue that when an officer demands identification, a reasonable person would know he was supposed to give it up. J.S. 21. That misses the point made by the Circuit Court. It is the statute and not the policeman's command which must be understood. Since the policeman may only *demand* (as opposed to request) identification in limited circumstances, the statute must make clear what those circumstances are. As the Circuit Court explains, the statute does not do so. J.S., App. "A", A-34-37.

C. The Circuit Court incorrectly balanced the "amenities of life" with crime prevention. J.S. 22.

In its discussion of the fourth amendment proscription against searches and seizures, the Circuit Court did mention the right of an individual wanderer to be free from government intrusion [J.S., App. "A", A-21-22]; however, this was a secondary or philosophical reason to support the hard constitutional law of *Terry* and *Brown*. If this philosophy is indeed a subject for this Court to determine, it has already done so in the cases mentioned and this statute, subject, as it is, to a multifaceted constitutional attack, is not the vehicle to renew that discussion.

CONCLUSION

This case does not merit plenary consideration by this Court. The Circuit Court opinion is not subject to any reasonable attack. A hearing in this matter would be a waste of public funds. This Court should grant the motion to affirm.

Respectfully submitted,

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Appellant's Brief

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY,
H. A. PORAZZO, T. W. SWAIM,
C. R. WEBB, P. A. CHAMPION,
A. A. ATKINS, A. J. RUBIN,
C. D. ZIMMERMAN, J. O. LARSON,
JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

BRIEF ON THE MERITS

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QUESTIONS PRESENTED[1]

Whether an individual may be punished for refusing to identify himself during a lawful investigatory stop which satisfies Fourth Amendment requirements (question specifically left open in Brown v. Texas (1979) 443 U.S. 47, 53, fn. 3).

Whether California Penal Code section 647, subdivision (e), as limited by California state courts is a statute which satisfies the Fourth Amendment by providing enforcement guidelines and affording effective notice.

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1. The questions presented are limited to the Constitutional issue available to appellants and do not include that portion of the judgment below relating to the jury trial granted to determine if the officers acted in "good faith."

Finally, and critically important, whether a request for identification is a more substantial intrusion than a pat down search.[2]

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2. Officer E. R. Kinslow, California Highway Patrol, and Chula Vista Police Chief William J. Winters are parties not appearing in the caption of this case.

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No. 81-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY,
H. A. PORAZZO, T. W. SWAIM,
C. R. WEBB, P. A. CHAMPION,
A. A. ATKINS, A. J. RUBIN,
C. D. ZIMMERMAN, J. O. LARSON,
JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal from the United States Court of Appeals, Ninth Circuit

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BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals (Jurisdictional Statement Appendix[3] A-1 through A-44) is reported at 658 F.2d 1362. The opinion of the District Court (Jurisd. Stt. Appen. A-74 through A-83) is not reported.

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3. Hereinafter abbreviated as (Jurisd. Stt. Appen.)

JURISDICTION

The opinion of the Court of Appeals was filed October 15, 1981 (Jurisd. Stt. Appen. A-1). Motions to stay the mandate were filed November 12 and 13, 1981 (Jurisd. Stt. Appen. A-84 through A-91), and granted November 24, 1981 (Jurisd. Stt. Appen. A-92 through A-93). Notice of Appeal was filed November 10, 1981 (Jurisd. Stt. Appen. A-94 through A-95). The Jurisdictional Statement and the Appendix to the Jurisdictional Statement were filed January 13, 1982. On March 8, 1982, this Court noted probable jurisdiction.

Jurisdiction of this appeal is conferred by 28 United States Code section 1254(2) which provides review by the United States Supreme Court.

> "By appeal by a party relying on a State statute held by a court of appeals to be

invalid as repugnent to the Constitution . . ."

STATEMENT OF THE CASE

The facts underlying the arrest and conviction of appellee for violating California Penal Code section 647, subdivision (e) were not part of the opinion of the District Court nor that of the Ninth Circuit (see Appendices A and C).

However, summarily stated, appellee's behavior that precipitated the Federal Civil Rights suit encompassed thirteen police contacts. On most occasions appellee furnished identification and was allowed to continue on his way. The few times Lawson refused to identify himself were considered for prosecution and some resulted in a trial and conviction.

Lawson then filed a complaint seeking: (1) a declaratory judgment that

section 647(e) is unconstitutional; (2) a mandatory injunction restraining the enforcement of the section; and (3) compensatory and punitive damages against various officers who arrested him because they deprived him of his constitutional rights.

Following a trial, the district court filed a memorandum opinion and judgment. The district court found that the statute was overbroad, noting that "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." The court therefore enjoined enforcement of the statute. The court held, however, that Lawson could not recover damages because each officer had a good faith belief that each "contact and/or arrest was lawful." (Jurisd. Stt. Appen. A-74, A-80.)

The history of section 647, subdivision (e) dates back to 1872 when section 647 was the vagrancy statute and provided:

> "Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for the space of ten days seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person, who lives in and about houses of ill-fame, and every common prostitute and common drunkard, is a vagrant, and punishable by imprisonment in the county jail not exceeding ninety days."

Through the years the statute was amended and broken into subsections. In 1903 subsection 6 related to those now covered by 647, subsection (e). At that time subsection 6 provided:

> "6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; . . ." (Stats. 1903, p. 96.)

In 1961, section 647, subdivision (e), in substantially its present form, read:

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> ". . . . . .
>
> "(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (Stats. 1961, ch. 560, p. 1672, § 2.)

In its present form, section 647, subdivision (e) has been construed, and held to stand constitutional muster, by California courts. (Jurisd. Stt. Appen. A-45 through A-73.)

SUMMARY OF ARGUMENT

California Penal Code section 647, subdivision (e), together with court interpretations, provide the type of guidelines that prevent arbitrary enforcement of the statute. Since the statute merely authorizes a neutral request for identification, such contacts may not even qualify as seizures. However, even if characterized as Fourth Amendment seizures, the police activity authorized is identical to nonstatutory seizures held to be constitutional.

Arrests for failure to comply with the request for identification are clearly within the legitimate interests

of the State of California. Codification of this interest is constitutional when the statute gives fair notice of the type of conduct prohibited. The request for identification carries with it its own notice of the conduct prohibited.

A request for identification is a reasonable option to afford police when circumstances permit. This type request constitutes a minimal intrusion which otherwise could precipitate a pat down search.

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ARGUMENT

I

CODE AND COURT DEFINITIONS OF PERSONS WHO MAY BE ASKED FOR IDENTIFICATION UNDER CALIFORNIA PENAL CODE SECTION 647, SUBDIVISION (e) PRECLUDE ARBITRARY ENFORCEMENT THUS, IF THE FOURTH AMENDMENT APPLIES IT IS NOT VIOLATED IF PERSONS WHO REFUSE ARE ARRESTED

It would first be instructive to define what persons fall within the purview of Penal Code section 647, subdivision (e). They must first qualify as a person "Who loiters or wanders upon the streets or from place to place without apparent reason or business . . . ." California courts have construed the terms loitering and wandering as used in section 647, subdivision (e) as either waiting or movement "for evil purposes". (People v. Caylor (1970) 6 Cal.App.3d 51, 56, emphasis added; People v. Weger (1967) 251 Cal.App.2d 584, 591-592.)

Once such a person is identified, it must then appear to a reasonable peace officer that the public safety demands the officer request identification. Again, the California courts have clearly defined what constitutes this public safety requirement. The court in People v. Solomon (1973) 33 Cal.App.3d 429[4/] compares the belief a California peace officer must have to the "reasonable belief that official intrusion is appropriate" that was set forth as the standard for non statutory contacts, on less than probable cause to arrest, in the similar case of Terry v. Ohio (1968) 392 U.S. 1, 20-21. (People v. Solomon, supra, 33 Cal.App.3d at pp. 432, 435.)

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4. The text of Solomon is set forth in the Jurisdictional Statement Appendices at A-45 through A-73.

Therefore, pursuant to the specific standards set forth by California courts, before a California officer may request identification of a person under the authority of section 647, subdivision (e), he must have articulable facts to support a reasonable belief that:

1. The person is loitering or wandering for an evil purpose, and

2. the officer has a reasonable belief the public safety demands he ask the person for identification because he has a reasonable suspicion of criminal activity.

Although other states have statutes similar either in language or

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intent to section 647, subdivision (e),[5] only Florida, to appellants' knowledge, has interpreted its own loitering statute in light of the Fourth Amendment.[6] That case cites to the California Solomon case which imposes an extremely strict standard on police acting pursuant to section 647, subdivision (e). Although a request for identificiation is not as intrusive as a pat down search, California requires the same basis and police analysis for either. (People v. Solomon, supra, 33 Cal.App.3d at pp. 438-439.) That standard is strict

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5. Utah, Utah Code Annotated, section 576-9-703(1); South Dakota, South Dakota Laws Annotated, section 22-13-1(5); New Hampshire, New Hampshire Revised Statutes Annotated, section 644:6(I); Oregon, Oregon Revised Statutes, section 166.075(b); Arkansas, Arkansas Statutes Annotated, section 41-2914(1)(a); Florida, Florida Statutes Title 44, section 856.021(1)(2); Georgia, Georgia Criminal Code, section 26-2616(a)(b); Delaware, Delaware Code, Title 11, section 1321(6).

6. State v. Ecker (Fla. 1975) 311 So.2d 104, certiorari denied 423 U.S. 1019.

to the extreme, when considered with the concept that the seriousness of the suspected crime dictates the appropriate police response and the extent of the permissible intrusion after the stop. (State v. McCord (1978) 576 P.2d 892, 894 (19 Wash.App. 250); People v. Higbee (1974) 37 Cal.App.3d 944, 948, hg. den. May 8, 1974; United States v. Collins (8th Cir. 1976) 532 F.2d 79, 83; State v. Gardner (1981) 626 P.2d 56, 59 (28 Wash.App. 721); United States v. Luckett (9th Cir. 1973) 484 F.2d 89, 90.) As the court stated in United States v. Garcia (E.D.N.Y. 1978) 450 F.Supp. 1020, 1023:

> "In striking the balance in a case involving an investigative stop at least four factors are pertinent: the gravity of the offense suspected, the probability of the suspect's implication in the offense, the need for prompt action, and the extent of the intrusion. United States v. Oates, supra, at 59. Since the test is what is

> 'reasonable', plainly, for example the lesser the seriousness and immediacy of the crime, the lesser the intrusion justified and the greater must be the likelihood of the suspect's involvement. There are no doubt circumstances where the enormity of the crime is such (placing bombs in a courtroom, for example) that all in the pertinent vicinity may be stopped even though the probability of an offense is small. Conversely to make a stop to investigate a minor peccadillo by one unlikely to depart or to dispose of the evidence would require highly substantial grounds for suspicion and in any event would warrant only the most moderate intrusion. Id."

Of course, reasonableness is the key to whether police conduct passes constitutional muster whether pursuant to statute or, absent a statute, using general constitutional principles. Not all situations where public safety is jeoparadized require a pat down search as this Court stated in Pennsylvania v. Mimms (1977) 434 U.S. 106, 109:

> "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officrs.' United States v. Brignoni-Ponce 422 U.S. 873, 878 (1975)."

There are also court delineated degrees of police contacts, and it is only when there is a seizure that the Fourth Amendment comes into play. Observations by police are a "contact" in the strictest sense of the word. Conversations between police and citizens are also contacts. However, in California, unless the citizen contacted perceives his liberty has been constrained by physical restraint, threat of force, or assertion of authority there has been no seizure. (In re Tony C. (1978) 21 Cal.3d 888, 895.) This concept conforms with that espoused by this Court in United States v. Mendenhall (1980) 446 U.S. 544, 552-554, and also

with the recent cases of Gomez v. Turner (D.C. Cir. 1982) ___ F.2d ___ (50 U.S.L. Week 2552); United States v. Elmore (5th Cir. 1979) 595 F.2d 1036, 1042; People v. DeBour (1976) 352 N.E.2d 562 (40 N.Y.2d 210); Login v. State (Fla.App. 1981) 394 So.2d 183.

Whenever requesting identification under appropriate circumstances is not a seizure, then the Fourth Amendment does not even apply. (United States v. Elmore, supra, 595 F.2d at p. 1041.) Appellants submit, therefore, a request made pursuant to section 647, subdivision (e) is not a seizure and, therefore, it need not be considered in light of the Fourth Amendment. However, even if it is assumed a request for identification pursuant to section 647, subdivision (e) does constitute some level of seizure, appellants would urge that when a

California peace officer asks a person who qualifies under section 647, subdivision (e) for identification the minimal intrusion on the citizen's privacy is constitutionally authorized because it is a reasonable seizure under the opposing interests of crime prevention and detection and the safety of the public and the police officer. (Michigan v. Summers (June 22, 1981) ___ U.S. ___ (69 L.Ed.2d 340, 346).)

Once the citizen, validly contacted pursuant to section 647, subdivision (e), is asked to provide identification, his arrest for failing to comply with such minimal intrusion violates no Fourth Amendment rights. Of course, once the citizen provides identification to the police, without more facts brought to the attention of the officer, the citizen is free to go. (People v. Bello (1975) 45 Cal.App.3d 970, 973.) However,

if an officer has sufficient articulable facts to make the initial request, the citizen has a duty to furnish the information. (California v. Byers (1971) 402 U.S. 424, 434.) Logic alone dictates that an officer with sufficient basis to ask for identification would be completely frustrated in preventing or detecting criminal behavior if his request could be ignored with impunity. (State v. Flynn (1979) 285 N.W.2d 710, 717 (92 Wis.2d 427); cert. den. 449 U.S. 846.) The California Legislature determined the state interest in detecting and preventing crime outweighed the minimal intrustion of requesting identification of persons

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qualifying under section 647, subdivision (e).[7] Since protecting the citizenry from criminal acts is a valid state purpose, People v. Soloman, supra, 33 Cal.App.3d at page 436, a citizen who refuses to provide identification under the strict guidelines of Penal Code section 647, subdivision (e) suffers no abridgment of his constitutional rights because his refusal triggers his arrest. In fact, the Flynn court recently held that if a proper request for identification is refused, the police may take the person's wallet and determine for themselves the citizen's identity. (State v. Flynn, supra, 285 N.W.2d 719.)

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7. U.C.R., Crimes in California have increased 23.4 per cent from 1975 to 1980. Some crimes experienced greater increase (i.e., robbery 34 percent, aggravated assualt 37.4 percent, homicides 40.2 percent, rape 41 percent). (Crime and Delinquency in California (1980), California Dept. of Justice, Bureau of Criminal Statistics.)

Therefore, under the guidelines set forth by California courts, police may lawfully request identification of citizens who meet the statutory and court imposed criteria. The minimal intrusion is a seizure of de minimis proportions, if a seizure at all, and completely within the proportionate interests the circumstances dictate. Furthermore, given the valid state interest in preventing and detecting crime, an arrest for failure to provide identification is constitutionally correct.

II

CALIFORNIA PENAL CODE SECTION 647, SUBDIVISION (e) GIVES ADEQUATE NOTICE AND, THEREFORE, IS NOT VAGUE

As discussed in Argument I, supra, a citizen may only be arrested for failing to provide identification. When the officer approaches a citizen who is

standing or moving about for an evil purpose under circumstances indicating public safety is threatened and asks for identification, the citizen is put on immediate notice of what section 647, subdivision (e) requires. (People v. Solomon, supra, 33 Cal.App.3d at p. 435.)

Furthermore, this Court and many others, Adams v. Williams (1972) 407 U.S. 143, 145-146; People v. Tooker (Colo. 1979) 601 P.2d 1388; Ebona v. State (Alaska 1978) 577 P.2d 698[8/] have characterized as constitutional, non statutory police activity identical to that authorized by section 647, subdivision (e). It would seem, therefore, any codification designed to memorialize what behavior is authorized and prohibited on the

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8. Justice Boochever concurred in this opinion which seems inapposite to the opinion he wrote when deciding the instant case below.

part of police, and citizens must satisfy consitutional fair notice requirements. In other words, clear language in a statute that provides for arrest upon failure to provide identification when requested by police should be held to provide more constitutionally clear notice than no statute at all. Granted the courts have interpreted section 647, subdivision (e) to clarify its meaning, but where state courts have construed a state statute, that state court construction must be accepted for purposes of federal constitutional review as if the state court construction were written into the statutes themselves. (Hebert v. Louisiana (1926) 272 U.S. 312, 316-317.)

This principle has been rigorously followed. "The interpretation by the [state court] puts [limiting] words in the statute as definitely as if it had

been so amended by the legislature." (Winters v. New York (1948) 333 U.S. 507, 514. See also Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 572-573, and compare Coates v. City of Cincinnati (1971) 402 U.S. 611, 612-613, and United States v. Vuitch (1971) 402 U.S. 62, 71-72.)

The opinion in People v. Solomon, supra, 33 Cal.App.3d 429, fleshes out the skeletal framework of the statute to reflect what section 647, subdivision (e) means in California. The Solomon court held the officer who seeks to utilize section 647, subdivion (e) in asking for identification must first have articulable facts sufficient for a pat down search. (People v. Solomon, supra, 33 Cal.App.3d at p. 435.) Such standards more than conform with federal constitutional requirements as well. (Brown v. Texas (1979) 443 U.S. 47, 51-52, fn. 2.)

Thus, the initial contact between the police and citizen never takes place unless there exists cause to conduct a Terry[9] pat down search.

Therefore, Penal Code section 647, subdivision (e) provides the notice required that overcomes any claim it is vague, for as interpreted by California courts it is virtually as complete and clear as American Law Institute, A Model Code of Pre-Arraignment Procedure, section 110.2, subdivision (1)(a)(i),[10]

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9. Terry v. Ohio, supra, 392 U.S.1.

10. "Section 110.2, Stopping of Persons

"(1) Cases in Which Stop is Authorized. A law enforcement officer, lawfully present in any place, may, in the following circumstances, order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in the Subsection,

III

THE INTRUSION AUTHORIZED BY SECTION 647, SUBDIVISION (e) OF REQUESTING INDENTIFICATION IS MINIMAL WHEN UNDERTAKEN ONLY UNDER CIRCUMSTANCES JUSTIFYING THE GREATER INTRUSION OF A PAT DOWN SEARCH

A request for identification, when considered in the circumstances under

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but in no case for more than twenty minutes:

"(a) Persons in suspicious circumstances relating to certain misdemeanors and felonies.

"(i) Such person is observed in circumstantes such that the officer reasonably suspects that he has just committed, is committing, or is about to commit a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or damage to property, and

"(ii) such action is reasonably necessary to obtain or verify the identification of such person, to obtain or verify an account of such person's presence or conduct, or to

which it is made, is a minimal intrusion if weighed against the value of such a

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determine whether to arrest such person.

"(b) Witnesses near scene of certain misdemeanors and felonies.

"(i) The officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and

"(ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and

"(iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

"(c) Suspects sought for certain previously committed felonies.

"(i) The officer has reasonable cause to believe that a felony involving danger

request to law enforcement. Furthermore, it is a neutral inquiry made by trained officers acting within strictly proscribed guidelines.

The police activity which can be undertaken under section 647, subdivision (e) is not a full interrogation as in Dunaway v. New York (1979) 442 U.S. 200. Neither can a request for identification be equated with the "sweep" type

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> of forcible injury to persons or of appropriation of or damage to property has been committed, and
>
> "(ii) he reasonably suspects such person may have committed it, and
>
> "(iii) such action is reasonably necessary to obtain or verify the identification of such person for the purpose of determining whether to arrest him for such felony."

of operation condemmed in Delaware v. Prouse (1979) 440 U.S. 648. Any inquiry into the validity of section 647, subdivision (e) must be made in the context that there are codified and court imposed standards under which the statute can be enforced. (See Argument I, supra.) Not only are there clear guidelines, but also these guidelines are imposed on trained police officers. Therefore, the assessment of whether section 647, subdivision (e) justified a request for identification is based on all the circumstances analyzed by a person trained to deduce probabilities and weighed in terms understood by those in law enforcement. (United States v. Cortez (1981) 449 U.S. 411, 418; United States v. Leyba (10th Cir. 1980) 627 F.2d 1059, 1062.)

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These trained officers[11] must coordinate their observations with their expertise and determine what action, if any, a given situation requires. This Court is well aware of the many apparently mundane situations which become life threatening. Almost 20 percent of officers killed in 1980 were murdered during traffic stops.[12] By the same token, officers may not respond to all situations as if their life depended upon immobilizing the citizen contacted. The response has to be consistent with the perceived problem yet accomplished with

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11. Pursuant to California Penal Code section 832.3 virtually all California peace officers must receive certification from the California Commission on Peace Officers Standards and Training (POST). Section 8.0 of POST, Performance Objectives, includes material on citizen contact covered under "Laws of Arrest."

12. U. S. Department of Justice, Sourcebook of Criminal Justice Statistics (1980).

the level of caution necessary to protect the officer. Of such dilemma's is the work of police comprised. Given the fact California police have a duty to investigate suspicious activities to prevent crime and maintain peace (People v. Higbee, supra, 37 Cal.App.3d at p. 949; hg. den. May 8, 1974), asking identification of a person who could, under Terry, be patted down seems eminently reasonable.

In fact, requesting identification may be less intrusive than placing the citizen under surveillance. Constantly being followed could infringe on freedom far more than responding to a simple request for identification. Bearing in mind the range of responses available to police, it is clear that requesting identification, if not a seizure (see

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argument I, supra),[12] has to be considered less intrusive than spread-eagling a citizen and patting them down for possible weapons.

Therefore, section 647, subdivision (e) allows an officer to do his duty, and, at the same time, utilize a minimally intrusive method to perform that duty.

CONCLUSION

For the reasons set forth above, appellants respectfully request

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12. See also Oberly, The Policeman's Duty and the Law Pertaining to Citizen Encounters (1981) 8 Pepperdine L.Rev. 653, 680-683.

the opinion of the Court of Appeals for the Ninth Circuit be reversed.

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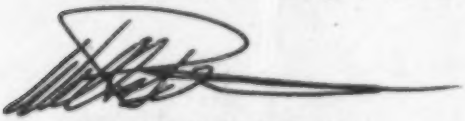

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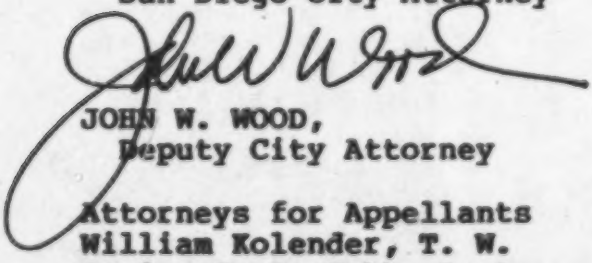

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WILLIAM KOLENDER, et al.,
Appellants,

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EDWARD LAWSON,
Appellee.

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ss.
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I, CLIFFORD REED, being duly sworn, depose and say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within mentioned mailing occurred and not a party to the subject cause: my business address is 110 West A Street, Suite 700, San Diego, California 92101.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 21, 1982.

Clifford E. Reed

Subscribed and sworn to before me this 21st day of April, 1982.

Vida M. Allen
Notary Public in and for
said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1982

Appellee's Brief

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CLERK

No. 81-1320

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, *et al.*,
Appellants,

v.

EDWARD LAWSON,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The California Court of Appeal has construed Section 647(e) of the California Penal Code to require a person to provide reliable proof of identity when demanded by a police officer who has a reasonable suspicion of criminal activity under the standard of *Terry v. Ohio,* 392 U.S. 1 (1968). The questions presented are:

1. Whether Section 647(e), as so construed, is unconstitutionally vague.

2. Whether Section 647(e), as so construed, violates the Fourth Amendment guaranty against unreasonable searches and seizures.

3. Whether Section 647(e), as so construed, infringes the Fifth Amendment privilege against compulsory self-incrimination.

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No. 81-1320

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, *et al.*,
Appellants,

v.

EDWARD LAWSON,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE APPELLEE

STATUTORY PROVISION INVOLVED

Section 647(e) of the California Penal Code provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

". . . .

"(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

STATEMENT OF THE CASE

During a 22-month period from March 1975 to January 1977, Appellee Edward Lawson, a black, thirty-six year old business consultant from San Francisco, was detained no fewer than fifteen times pursuant to California Penal Code Section 647(e). These stops occurred while Lawson was walking or standing on public thoroughfares in the San Diego-Chula Vista area of Southern California, where he occasionally made business and personal trips.

Lawson's appearance is unconventional. His hair is tightly braided, and he typically dresses in a sports coat, slacks and sneakers. In addition, whenever practicable Lawson travels short distances by foot, and somewhat longer distances by hitchhiking.[1] Virtually all of the stops took place in predominantly white sections of San Diego and Chula Vista. Other than stops pursuant to Section 647(e), Lawson has never been detained by the police.

In an effort to forestall any further detentions under Section 647(e), in March 1977 Lawson filed a complaint in United States District Court seeking a declaration that Section 647(e) is unconstitutional and an injunction against its enforcement.[2] (JA-22 to JA-23.) Lawson tried the matter *in pro per.*

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[1] The California Vehicle Code only prohibits hitchhiking "in a roadway." Cal. Vehicle Code § 21957.

[2] Lawson also sought to recover damages for deprivation of his constitutional rights from the various officers who had arrested him. The District Court held that damages were not recoverable because each defendant-officer had acted in good faith. (Appendix to Jurisdictional Statement, A-82 and A-83.) The Ninth Circuit reversed this portion of the District Court's ruling, holding that Lawson was entitled to have a jury determine the good faith of the defendants. *Lawson v. Kolender,* Appendix to Jurisdictional Statement, A-42 to A-44, 658 F.2d 1362, 1372 (9th Cir. 1981). Appellants do not contest this aspect of the Court of Appeals' decision.

Similarly, in March 1976, at approximately 1:00 a.m., a San Diego officer motioned Lawson to his vehicle for questioning from a freeway entrance location where he was hitchhiking. (R.T. 320-24.) The patrolman stated that Lawson "was standing . . . technically on the freeway," and could block traffic if a driver braked to offer a ride. (R.T. 324-25.)

Other detentions were purportedly motivated by police investigations of recently reported criminal activity. A Chula Vista officer testified that he detained Lawson in April 1975 because he had received a report concerning a black male suspected of murder and an hour later had observed Lawson walking through a closed business area. (R.T. 154, 160.) The stop and direction to identify were predicated upon the policeman's belief that it was exceptional for a black person to be crossing the neighborhood at that time of the evening. (R.T. 160.)

A few days after this incident Lawson was stopped in Chula Vista at approximately 9:30 a.m. (R.T. 195.) The patrol officer who detained Lawson stated that he had been contacted by a citizen who expressed concern about a tall, slender, long-haired black male whom he believed to be loitering near a private school. (*Ibid.*) When reached by the officer, Lawson was walking about a half block from the school. (R.T. 196.)

Lawson was stopped again in Chula Vista in January 1976 while walking in the early morning and was brought to an officer's vehicle for questioning. (R.T. 20-21.) The policeman who detained Lawson had received reports that persons within the immediate area had recently entered locked vehicles in parking lots and apartment complexes. (R.T. 207, 232.)

A patrol officer who had learned of several burglaries committed in recent days in the Pacific Beach area in San Diego, purportedly involving a black male, detained Lawson in May 1976. (R.T. 306, 308, 313.) At the time—approximately 9:00 a.m.—Lawson was hitchhiking on a major commercial street. The officer stated that he had been attracted by

A. The Circumstances Surrounding The Repeated Detentions Of Lawson for Identification

The evidence at trial disclosed a wide variety of purported justifications for stops of Lawson and subsequent demands for proof of his identity. The detentions usually lasted from five minutes to twenty minutes. Several stops culminated in arrests with significant pre-trial incarceration, and one resulted in a conviction for violation of Section 647(e). At no time was Lawson stopped by an officer who was investigating a crime for which Lawson had been named as a suspect or for which disclosure of Lawson's name would have provided probable cause to arrest.

Several of the detentions were allegedly based on an officer's perception that Lawson might be engaged in some type of unlawful behavior. For example, a San Diego policeman stopped Lawson on January 24 or 25, 1977, as he walked on a residential street carrying a legal pad. The officer observed Lawson for 15 to 30 seconds, judged him to be soliciting door-to-door and could see no solicitor's permit. (R.T. 286-89, 291.) The officer grabbed Lawson's arm when he ignored questions and attempted to walk away. (R.T. 289.)

Lawson was detained while hitchhiking close to a San Diego community campus at approximately 10:30 p.m. in February 1976. (R.T. 24-25.) According to Lawson, other individuals—including some additional hitchhikers—were present near him (though all these persons were white) when a Highway Patrol officer approached. (R.T. 24.) The officer testified that Lawson was the only individual in the vicinity of the intersection where he made the stop. (R.T. 245.) The officer further asserted that the detention and his subsequent demand for identification were warranted because Lawson was hitchhiking at an illegal location on the sidewalk and appeared to be dancing in a manner that might distract drivers watching him. (R.T. 246-47.)

Lawson's appearance. (*Ibid.*) Nearly one hour later, other police who had been briefed regarding a tall, thin black suspect wearing dark clothing also stopped Lawson and ordered him not to move. (R.T. 179-83.) As before, Lawson was hitchhiking when detained. (*Ibid.*)

A number of the stops were based simply on a general belief that Lawson appeared "suspicious." Thus, a few days after the stop because of concern that he was soliciting without a permit, Lawson was detained by another San Diego officer who saw him walking in the late evening on an otherwise vacant major street in La Jolla. (R.T. 48, 266-67.) The policewoman stated that she regarded this conduct as sufficiently unusual by itself to warrant the stopping. (R.T. 266-67.)

In March 1975 a Chula Vista deputy sheriff, who was driving an ambulance, stopped Lawson as he walked in an unincorporated residential area shortly before midnight. (R.T. 116-119.) The officer premised his action upon his belief that the neighborhood was a "high crime area" where several burglaries had recently occurred. (R.T. 120.) The deputy also stated that Lawson was walking in the middle of the roadway obstructing traffic (*ibid.*), although Lawson testified that he was travelling at the side of the road where a sidewalk would otherwise be. (R.T. 7.)

In March 1975 a San Diego police officer entered an Ocean Beach restaurant and instructed Lawson and a black business associate to leave the table where they were eating dinner and to come outside. (R.T. 14-16.) The officer stated as he detained and questioned Lawson for identification that he was looking for a one-legged white man. Lawson and his associate were the only black persons in the restaurant. (R.T. 15-16.)

Several of the detentions lasted between ten and twenty minutes (*see, e.g.*, R.T. 19, 47 & 183, 58 & 294); others were concluded in five to ten minutes. (*See, e.g.*, R.T. 16, 198, 271, 311.) Police often consumed most of this time by requesting

their dispatchers to conduct warrant checks on Lawson, and then waiting for the results of those checks. (*See, e.g.*, R.T. 182, 197, 293, 309-10, 330.) These checks never revealed information implicating Lawson in criminal activity. On one occasion the officer stopping Lawson called neighboring stations to determine if crime reports existed that described suspects who resembled Lawson. (R.T. 215.)

Lawson did not always produce proof of identification when requested. In one such instance, the officer who detained Lawson because of reports that persons had broken into locked vehicles told him that identification was necessary since he "had never seen him before, the time of day it was [early morning], and the fact that it was pertinent that [he] know his purpose for being there." (R.T. 212-13.) The policeman testified that Lawson replied "to the effect that it was none of [the officer's] business who he was or where he lived or where he was going." (R.T. 212.) Lawson was then arrested pursuant to Section 647(e), frisked and transported to the police station. (R.T. 213.) Police searched Lawson and removed his driver's license and passport. (R.T. 214-15.) Officers then took Lawson to the County Jail, where he was held for 48 hours. (R.T. 22.) A criminal prosecution resulted; at trial, the judge dismissed charges after the arresting patrolman completed his testimony. (R.T. 23.)

Lawson also declined to identify himself to the deputy sheriff who detained him because of reports of recent burglaries in an unincorporated area of Chula Vista. The officer asked Lawson "specifically who he was, where he was coming from, and specifically where he lived and where he was going." (R.T. 119.) When Lawson did not produce identification, he was arrested, handcuffed and searched. (R.T. 122.) The officer removed identification papers from Lawson, and then transported him to a Sheriff's substation where he was held for more than one day. (R.T. 13 & 122.) Lawson testified that the officer remarked during the interrogation for identification, "This is going to make my night." (R.T. 8.)

The officer who stopped and questioned Lawson for hitchhiking from an improper part of the sidewalk arrested and handcuffed Lawson after he would not provide identification papers. (R.T. 249.) Police subsequently transported Lawson to jail, where he remained for one day. (R.T. 26.) Charges were brought pursuant to Section 647(e), but dismissed by the trial court at arraignment. (R.T. 26-27.)

Lawson also refused to identify himself to the ambulance-driving San Diego police officer who detained him while hitchhiking "technically" on the freeway. The officer stated that he sought proof of identity "in case at a later date or time some other officer finds [Lawson] standing there in the same place and he's been advised not to stand there." (R.T. 326.) The policeman arrested Lawson, handcuffed him and then took from his sports jacket a passport and driver's license. (R.T. 329.) The officer testified that he considered Lawson an escapee from a mental hospital, an escaped felon from another state or a perpetrator of a recent crime because a "flat refusal . . . to identify [one]self . . . is common to people who are wanted in other states, wanted locally or who are mental cases." (R.T. 340.) The officer also said he "thought maybe [Lawson] may have committed a crime in the area and wanted by being totally intolerable that we would just give up our pursuit and he could be on his way . . . ." (R.T. 331.) Lawson was driven to the police station where the booking captain told the arresting officer to complete a field interrogation file entry on Lawson, conduct a warrants check, and release him. The officer first resisted release, but eventually relented—thirty to forty minutes after the initial stop. (R.T. 330.)

B. The California Courts' Construction of Penal Code Section 647(e)

The meaning and constitutionality of Penal Code Section 647(e) have been considered by the California Courts of Appeal—most recently in *People v. Solomon,* 33 Cal.App.3d

429 (1973), *cert. denied,* 415 U.S. 951 (1974).[3] As construed by the California courts, there are three elements that must be proved to establish a violation of Section 647(e):

> "(1) loitering on the streets, (2) refusal to identify and account on request, (3) in circumstances involving the public safety." *Id.* at 432.

1. *Loitering On The Streets*

In *People v. Weger,* 251 Cal.App.2d 584 (1967), the Court of Appeal held that the words "loitering or wandering" as used in Section 647(e) "do not connote unlawful activity. They do no more than describe the person who may be asked by a peace officer to identify himself." *Id.* at 592-93. Notwithstanding dictum in *People v. Caylor,* 6 Cal.App.3d 51, 56 (1970), suggesting the need to prove that the prohibited "wandering" was for "evil purposes," the court in *People v. Solomon* recognized that the "loitering or wandering" element of the section was substantially similar to provisions of the loitering statutes invalidated on vagueness grounds in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), and *Palmer v. City of Euclid,* 402 U.S. 544 (1971).

2. *Refusal to Identify*

The duty to identify has been construed to require a "genuine" identification:

> "one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *People v. Solomon, supra,* 33 Cal.App.3d at 438.

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[3] The Ninth Circuit reviewed the relevant federal and state case law establishing that, in the absence of a California Supreme Court decision interpreting Section 647(e), the opinion of the Court of Appeal in *People v. Solomon* is properly considered the authoritative state court construction of Section 647(e). See *Lawson v. Kolender,* Appendix to Jurisdictional Statement, A-6 n.3, 658 F.2d 1362, 1364 n.3.

Although the statutory directive that the suspect not only identify himself but also "account for his presence" has been construed to be "subordinate" to the identification requirement, the account-for-presence element is operative "to the extent it assists in producing credible and reliable identification." *Ibid.*

3. *Circumstances Involving The Public Safety*

The third element of Section 647(e), "circumstances involving the public safety," has been held to be comparable to the standard articulated in *Terry v. Ohio,* 392 U.S. 1 (1968), to permit a brief detention of an individual whose conduct raises a reasonable suspicion of criminal activity:

> "Under *Terry* a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate. Under section 647, subdivision (e) a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between these two formulations. Each amounts to what Justice Harlan has termed 'articulable suspicion less than probable cause.'" *People v. Solomon, supra,* 33 Cal.App.3d at 435 (citations omitted).

C. The District Court and Court of Appeals Decisions

At the conclusion of Lawson's trial challenging Penal Code Section 647(e), the District Court initially entered findings of fact and conclusions of law sustaining the constitutionality of Section 647(e), as construed by the California courts. (JA-24 to JA-30.) In a memorandum opinion filed on September 10, 1979, however, the District Court vacated its earlier findings and held that Section 647(e) is unconstitutionally overbroad. (Appendix to Jurisdictional Statement, A-74 to A-83.)

The District Court's ruling was affirmed by the Ninth Circuit, Appendix to Jurisdictional Statement, A-1 to A-44, 658 F.2d 1362. The Ninth Circuit held that Section 647(e) "intrudes upon the fundamental right to be secure against unreasonable searches and seizures" (Appendix to Jurisdictional Statement, A-21; 658 F.2d at 1367), and that it violates due process because "it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement." (Appendix to Jurisdictional Statement, A-29, 658 F.2d at 1369.)

SUMMARY OF ARGUMENT

Section 647(e) places the full coercive power of the State behind a demand that an individual suspected of criminal activity produce reliable proof of identity. Such a forced identification requirement—unexpected, unannounced and focused on a single individual—impermissibly threatens the exercise of important constitutional interests in personal security, mobility and privacy.

A. As construed by the California Court of Appeal, once the standard for brief detention announced in *Terry v. Ohio*, 392 U.S. 1 (1968), has been satisfied, Section 647(e) criminalizes the refusal of a person to produce reliable identification. The overwhelming majority of persons at any given time need not make such disclosure. Section 647(e) fails to provide constitutionally adequate notice to potential suspects that such a demand for proof of identification is proper and fails to define sufficiently the standards to be utilized by police officers enforcing its requirements.

The *Terry* standard is deliberately and necessarily imprecise. It does not purport to set out when a police stop is appropriate in view of the myriad factual situations that may arise. Rather, the standard constructs an objective test by which courts may analyze the constitutionality of investigatory detentions in the particular circumstances presented to them.

The very nature of the *Terry* standard makes it impossible for the individual detained in the stop-and-identify situation to determine whether he or she must disclose reliable identification. The information upon which an officer forms the *Terry* judgment is typically unknown or unknowable to anyone outside law enforcement. In addition, reasonable persons can differ over whether a particular stop is lawful. Regardless of how innocent his planned conduct may be, therefore, an individual can secure no sufficient guidance to determine whether he will at some point be the proper subject of a *Terry*-stop; nor will he be able to forecast the conduct and circumstances that will satisfy the *Terry* standard in the view of a trained officer.

Even at the point of detention and demand for production of identification, Section 647(e) fails to provide fair notice. California courts have never defined the nature of the identification required, holding only that it must be "reliable" and "genuine." Individuals are left to speculate as to the nature of the proof of identity they are required to disclose under the statute.

Section 647(e) also permits arbitrary and discriminatory enforcement. The section does not plainly define the specific instances when an individual must furnish reliable evidence of identity. That determination is left to the inferences and deductions that a trained officer draws. Illegality is thus defined in subjective terms, requiring in each instance an *ad hoc* police determination of criminality.

B. The imposition of criminal sanctions for the refusal or inability to produce reliable proof of identification, when the demand for identification is made without probable cause to believe an offense has been committed, violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Section 647(e) represents an unwarranted departure from the probable cause standard. Its serious intrusion on personal security and privacy outweighs the speculative possibility that identification may provide a link leading to arrest.

Section 647(e), at its core, makes criminal an individual's refusal to allay an officer's suspicions regarding himself or his conduct. Allowed to stand, Section 647(e) facilitates pretextual arrests and searches where there is an insufficient basis to arrest the suspect for the underlying offense that justified the initial stop. Section 647(e) likewise collapses the probable cause requirement for a search incident to arrest into the *Terry* standard.

To be sure, prevention of crime is a weighty social objective. It is unclear, however, to what degree making criminal the refusal to disclose identification itself furthers that objective or the objective of crime detection. Typically, any refusal to provide proof of identity will not bring an end to an officer's investigation of the suspicious circumstances that justified the initial detention.

Moreover, the interests assertedly served by the identification requirement—crime prevention and detection—have never been found by this Court to be sufficient by themselves to justify a seizure beyond the initial stop authorized by *Terry*. Here no other, narrower and more compelling concerns exist to justify a retreat from the traditional probable cause standard.

C. The Section 647(e) requirement of proof of identity frustrates the Fifth Amendment's prohibition against the use of legal process to compel self-incrimination. Although a regulation demanding proof of identity does not necessarily violate the Fifth Amendment, a disclosure requirement designed to facilitate criminal investigation and conviction is impermissible when directed at a highly selective group or one inherently suspect of criminal activities. Disclosure of one's name and address in those circumstances in which Section 647(e) is enforced involves real and appreciable hazards of self-incrimination, and is therefore unconstitutional.

ARGUMENT

I. CALIFORNIA PENAL CODE SECTION 647(e) IS UNCONSTITUTIONALLY VAGUE

Section 647(e) on its face, like all unconstitutionally vague laws, suffers from two separate, but equally fatal, defects: First, it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* __ U.S. __, 71 L.Ed.2d 362, 371 (1982). Second, it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford, supra; Papachristou v. City of Jacksonville,* 405 U.S. 156, 168-69 (1972). *See also Colautti v. Franklin,* 439 U.S. 379, 390 (1979); *City of Mesquite v. Aladdin's Castle,* __ U.S. __, 71 L.Ed.2d 152, 160 & n.12 (1982).

As a matter of constitutional principle, of course, the leeway judicially afforded vague statutory language is not fixed. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment." *Village of Hoffman Estates, supra,* 71 L.Ed.2d at 371. Thus, for example, an ordinance that requires the police to consider whether a license applicant demonstrates any "connection with criminal elements" is not unconstitutionally vague, because "[t]he Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations." *City of Mesquite v. Aladdin's Castle, supra,* 71 L.Ed.2d at 161. But the identical "definition of 'connection with criminal elements' in the ordinance [may be] so vague that a defendant could not be convicted of having such a connection." *Id.* at 160.

Last Term in *Village of Hoffman Estates* this Court once again set forth the primary elements affecting the clarity that the Constitution demands of a statute or ordinance: (1) Is the law at issue one that relates to economic regulation or to controlling individual behavior? (2) Does the law contain only civil sanctions or does it impose criminal penalties? (3) Is there a scienter requirement or adequate notice that particular conduct is proscribed? (4) Most importantly, does the law "threaten to inhibit the exercise of constitutionally protected rights"? *Village of Hoffman Estates, supra,* 71 L.Ed.2d at 372. *See Grayned v. City of Rockford, supra,* 408 U.S. at 109; *Papachristou v. City of Jacksonville, supra,* 405 U.S. at 165-66 & n.8. *See also Colautti v. Franklin, supra,* 439 U.S. at 391.

In light of those factors, Section 647(e)—a criminal statute directed at individual behavior closely related to the exercise of important constitutional rights—must be subjected to the most rigorous scrutiny. Measured by such standards, Section 647(e) is unconstitutionally vague.

A. Section 647(e) Inhibits the Exercise of Constitutionally Protected Interests in Personal Security, Mobility and Privacy

Section 647(e) does not simply authorize the police to detain an individual to maintain the status quo briefly while conducting an immediate investigation of suspected criminal activity. *Cf. Adams v. Williams,* 407 U.S. 143, 146 (1972). Instead, it places the full coercive power of the State behind a demand that the individual produce reliable identification. Such a forced identification requirement—unexpected, unannounced and focused on a single individual—threatens important constitutional interests in personal security, mobility and privacy.

A provision of the Texas Penal Code substantially similar to Section 647(e) was considered in *Brown v. Texas,* 443 U.S.

47 (1979).[4] In *Brown*, however, the Court concluded that the statutory elements of the offense had not been satisfied since none of the circumstances preceding the officer's detention of the appellant justified a reasonable suspicion that he was involved in criminal conduct. 443 U.S. at 52. Without addressing the constitutionality of the underlying statute, the Court held that in the absence of such a reasonable suspicion, based on objective facts, the police may not detain an individual for the purpose of requiring him to provide proof of his identity. Writing for a unanimous Court, the Chief Justice explained:

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."
>
> "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest [in preventing crime] and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Id.* at 51, 52.[5]

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[4] Texas Penal Code § 38.02, Failure to Identify as Witness, provided: "[a] person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." *See* 443 U.S. at 49 n.1.

[5] The Court in *Brown v. Texas* expressly reserved the question now at bar: "[W]hether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." *See* 443 U.S. at 53 n.3. Nonetheless, as demonstrated in Section II, below, the same balancing of the "right to personal security and privacy" against the public interest in preventing crime that provided the foundation for the holding in *Brown* requires a negative answer to that question and invalidation of California Penal Code § 647(e).

(Footnote continued on next page)

The principles underlying the "right to personal security and privacy" upon which the *Brown* Court relied were comprehensively summarized by Justice Brandeis in his now-famous dissent in *Olmstead v. United States,* 277 U.S. 438, 478-79 (1928):

> "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

Although this right to freedom from official interference does not give rise to a generalized "right to individual anonymity," *see Whalen v. Roe,* 429 U.S. 589, 604 n.32 (1977), important Fourth Amendment values are jeopardized by forced identification requirements in the context of "affirmative, unannounced, narrowly focused intrusions into individualized privacy during the course of criminal investigations." *Ibid.* A police officer's demand for production of reliable identification,

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(Footnote continued from preceding page)

Numerous courts have invalidated criminal statutes similar to California Penal Code § 647(e). *See, e.g., City of Bellevue v. Miller,* 85 Wash.2d 539, 536 P.2d 603 (1975) (en banc); *City of Portland v. White,* 9 Or.App. 239, 495 P.2d 778 (1975); *People v. Berck,* 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied,* 414 U.S. 1093 (1973); *United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166 (2d Cir. (1974), *aff'd on other grounds sub nom. Lefkowitz v. Newsome,* 420 U.S. 283 (1975); *Hall v. United States,* 459 F.2d 831 (D.C. Cir. 1972); *State v. Starks,* 51 Wis.2d 256, 186 N.W.2d 245 (1971); *People v. DeFillippo,* 80 Mich.App. 197, 262 N.W.2d 921 (1977), *rev'd on other grounds,* 443 U.S. 31 (1979); *but see State v. Ecker,* 311 So.2d 104, 109 (Fla.), *cert. denied,* 423 U.S. 1019 (1975).

Other courts have limited provisions in statutes requiring suspects to account for their presence, prohibiting their use as specific elements of an offense. *See, e.g., State v. Zito,* 54 N.J. 206, 254 A.2d 769 (1969); *United States v. McClough,* 263 A.2d 48 (D.C. 1970).

accompanied by the threat of criminal sanction authorized by Section 647(e) on less-than-probable cause, is such an intrusion into individual privacy. *See Brown v. Texas, supra,* 443 U.S. at 51. *See also Michigan v. DeFillippo,* 443 U.S. 31, 43 (1979) (Brennan, J., dissenting).[6]

An official demand for production of reliable identification accompanied by the threat of criminal sanction in the context of an on-the-street encounter also impairs the constitutionally based right to personal mobility. *See, e.g., Kent v. Dulles,* 357 U.S. 116, 126 (1958) ("[Travel] may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."). *Accord, Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964). *See also id.* at 520 (Douglas, J., concurring) ("freedom of movement is the very essence of our free society"); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 164 (1972):

> "[T]hese activities [including 'wandering or strolling'] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence."

Control over personal mobility is directly threatened when a detention and demand for identification is triggered by the act of "loitering" under "suspicious" circumstances not rising to the level of probable cause. The requirement that reliable proof of identity be produced extends the period of the investigative detention—further interrupting mobility. (*See, e.g.,* R.T. 19, 47

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[6] That the intrusion takes place on the street does not diminish the impact on the individual's constitutional rights; as recognized in *Terry v. Ohio, supra,* 392 U.S. at 9, the Fourth Amendment's protection of his right to personal security "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."

& 183, 58 & 294.) The need to provide an address or some other "means for later getting in touch with the person," *People v. Solomon, supra,* 33 Cal.App.3d at 438, further suggests that the farther one is away from home or the more "inappropriate" the locale for the detained suspect, the more accounting-for-one's presence will be required by the detaining officer. (*See, e.g.,* R.T. 21, 120 & 138.) Indeed, knowledge that one may be deprived of his or her anonymity based upon an officer's "suspicion" may entirely discourage movement by certain types of people into particular areas of a community. *Compare Davis v. Mississippi,* 394 U.S. 721, 727 n.6 (1969); *Norwell v. Cincinnati,* 414 U.S. 14, 16 (1973) (overturning conviction for disorderly conduct with the intent to annoy) ("one is not to be punished for nonprovocatively voicing his objection to what he felt was a highly questionable detention by a police officer"); *Dunaway v. New York,* 442 U.S. 200, 210 n.12 (1979) (quoting *Terry v. Ohio, supra,* 392 U.S. at 34 (White, J., concurring)). *See generally O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.").

Section 647(e) also implicates significant Fifth Amendment values, as well as those protected by the Fourth Amendment. The Fifth Amendment "reflects the Constitution's concern for '. . . the right of each individual "to a private enclave where he may lead a private life." ' " *Tehan v. Shott,* 382 U.S. 406, 416 (1966); *Katz v. United States,* 389 U.S. 347, 350 & n.5 (1967):

> "[The Fifth Amendment] respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch v. United States,* 409 U.S. 322, 327 (1973).

The demand for proof of identification in the context of a criminal investigation directly impairs these constitutional values. Accordingly, the Constitution demands that the language and meaning of Section 647(e) be particularly precise and free of ambiguity. *See Village of Hoffman Estates, supra.*

B. Section 647(e) Fails to Provide Reasonable Notice of the Unlawful Conduct It Prohibits

Against this backdrop of significant Fourth and Fifth Amendment values, it is apparent that Section 647(e) fails to provide constitutionally adequate notice to potential suspects and fails to define sufficiently the standards to be utilized by police officers enforcing its requirements.

Once the standard for brief detention announced in *Terry v. Ohio*, 392 U.S. 1, 30 (1968), has been satisfied, Section 647(e) criminalizes the refusal of a person to "produc[e] . . . reliable identification," that is, "genuine identification . . . carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *People v. Solomon, supra,* 33 Cal.App.3d at 438.

The overwhelming majority of persons at any given time need not make such disclosure. The refusal to provide proof of identity is not an act that may be prohibited independently from the antecedent suspicion. *See Brown v. Texas, supra,* 433 U.S. at 51, 52. Thus, the issues of notice and fair enforcement turn on whether a person can sufficiently know that he somehow is no longer a part of that majority and must produce and disclose "reliable identification" upon official demand.

1. *The* Terry *Standard Was Designed Solely for Use in Investigation.*

The *Terry* standard—and thus the provision of Section 647(e) that has been construed to incorporate that standard[7]—is susceptible to both constitutional and unconstitutional application. As intended by the Court in *Terry,* the standard—like the licensing ordinance in *City of Mesquite*—was drafted to give directions to officers carrying out investigations. Its enforcement specifically addresses the governmental interest

[7] The statutory language reads: "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." *See* p. 9, above.

> "of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of *investigating* possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra,* 392 U.S. at 22 (emphasis added).

So limited to governing investigatory conduct, the standard is deliberately and necessarily imprecise. It does not purport to set out—as indeed it could not[8]—when a police stop is appropriate in view of "the myriad factual situations that arise." *United States v. Cortez,* 449 U.S. 411, 417 (1981).[9]

Moreover, as the California District Attorneys Association concedes in its Amicus Brief in support of Appellants, "[i]f such standards are to be of any use at all [to investigating officers], they must necessarily be general in nature since they will be applied in virtually an infinite variety of situations."[10]

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[8] *See* 3 W. LaFave, *Search and Seizure* § 9.3, p. 59 (1978) ("It is certainly asking too much to expect that the basic standard which is to serve as the starting point for analysis should from its inception provide a ready answer for every conceivable factual situation."); *id.* at p. 69 ("The protean variety of observed circumstances which might lead to a stopping makes it difficult to state clearly precisely what situations are sufficiently suspicious to justify a stop.").

[9] "Street encounters between citizens and police officers are incredibly rich in diversity." *Terry v. Ohio, supra,* 392 U.S. at 13.

[10] Brief for Amicus CDAA, p. 44. The brief continues:

> "Whenever a general standard, such as in P.C. section 647(e), is applied to a specific set of facts, there is always a judgment, *sometimes a difficult one,* that must be made as to whether the specific set of facts fall within the general standard. This legal fact of life does not mean that a standard is unconstitutionally vague, *it merely means that a standard must be of a general nature because: All the circumstances in which it will be applied simply cannot be anticipated when the standard is formulated* and a standard's very nature, in the context of laws such as P.C. section 647(e), is to be comprehensive . . . ." *Ibid.* (Emphasis added.)

See also id. at 15 n.4 ("[W]e find ourselves in an area where hard and fast rules just do not work to anyone's complete satisfaction. It is a vice inherent in formulating general standards in an attempt to cover an infinite array of circumstances and people.").

The *Terry* standard simply constructs an objective test by which courts may analyze the constitutionality of investigatory detentions in the many varied and particular circumstances presented to them. *Delaware v. Prouse,* 440 U.S. 648, 654-55 (1979).

The language of the *Terry* standard, *standing alone in this respect,* creates no constitutional difficulties, no matter its vagueness.[11] But this vagueness assumes different constitutional meaning once the language is made part of a penal statute such as Section 647(e). The provisions of the statute are no longer simply directions to investigate; they are now the elements of a crime, which must be understood by the potential defendant, applied by the police officer and ultimately proved in court by the prosecution. As indicated last Term in *Village of Hoffman Estates* and *City of Mesquite,* under these circumstances the consequence of inadequate notice and arbitrary enforcement becomes substantially more than a brief detention; at issue also is the additional deprivation of liberty criminal defendants suffer from arrest through conviction. *See Grayned v. City of Rockford, supra,* 408 U.S. at 108 ("[A]n enactment is void for vagueness if its [criminal] prohibitions are not clearly defined.").

2. *The Deliberate Imprecision of the* Terry *Standard Prevents Fair Notice of the Required Conduct.*

The very nature of the *Terry* standard makes it impossible for the individual to determine when he or she must produce and disclose "reliable identification" upon official demand.[12]

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[11] Some commentators have criticized the standard as too vague even for investigatory purposes. *See, e.g.,* Schwartz, "Stop and Frisk (A Case Study in Judicial Control of the Police)," 58 *J.Crim. L.C. & P.S.* 433, 434 (1967).

[12] Section 647(e) contains no scienter requirement. *See Village of Hoffman Estates, supra,* 71 L.Ed.2d at 372. ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.")

Whether, for example, an officer possesses "a particularized and objective basis for suspecting the particular person stopped of criminal activity" (*United States v. Cortez, supra,* 449 U.S. at 418-19) depends upon the peculiar training and experience of the *officer. Id.* at 418;[13] *United States v. Mendenhall,* 446 U.S. 544, 561 (1980) (Powell, J., concurring), and cases cited there. Information upon which the officer forms the *Terry* judgment may be unknown or unknowable to anyone outside of law enforcement *(see, e.g., United States v. Mendenhall, supra* (suspicion in part based upon confidential DEA profile); *Reid v. Georgia,* 448 U.S. 438 (1980) (same); *State v. Ochoa,* 112 Ariz. 582, 544 P.2d 1097 (1976) (profile for detection of stolen vehicles transported to Mexico)), and often may bear little or no relationship to the individual or any of *his* activities. *See generally* 3 LaFave, *supra,* § 9.3(c)-(f) (identifying as factors that may be relied upon to satisfy the *Terry* standards: "[l]ocation near scene of recent crime"; "[k]nown or probable direction of offender's flight"; "time of day"; "[i]nformation from an informant"; "[i]nformation via police channels.") It is the officer's *perception* that ultimately matters, not the reality of the situation: One need not in fact be engaged in unlawful activity to appear criminally suspect.

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[13] The Court in *Cortez* explained that such training and experience would not be available to the lay person:

> "[T]he analysis proceeds with various objective observations [of the officer], information from police reports, . . . and [police] consideration of the modes or patterns of observation of certain kinds of lawbreakers. *From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person . . . . [T]he evidence thus collected must be seen and weighed . . . in terms . . . understood by those versed in the field of law enforcement." Ibid.* (Emphasis added.)

Law enforcement training manuals typically provide specific instructions regarding what can constitute lawful *Terry*-type detentions. *See, e.g.,* Los Angeles Police Department, "Identifying Requirements and Authority for Interviewing," 2-1, 8-1 (Research and Design Unit Training Division, Los Angeles Police Academy 1979); LAPD Training Division, "Laws of Arrest and Arrest Procedures" (Revised 1979); LAPD Training Bulletin, vol. VII, no. 15 (April 30, 1975).

The deliberate indefiniteness of the *Terry* standard has other implications. Reasonable persons—even if fully aware by some means of the factors an investigating officer has considered in reaching his conclusion that "reasonable suspicion" exists—can differ over whether a particular stop is lawful. Members of this Court, for instance, have themselves frequently disagreed as to the appropriateness of a police detention based upon careful consideration of the same record. *Compare, e.g.,* majority *with* dissenting opinions in *United States v. Mendenhall, supra,* and in *Adams v. Williams,* 407 U.S. 143 (1972).[14] *Cf. Ybarra v. Illinois,* 444 U.S. 85 (1979) (majority opinion at 92-93, and dissenting opinion of Rehnquist, J., at 106, differing as to existence of "reasonable belief or suspicion" that person to be frisked was "armed and dangerous"). In California, like most jurisdictions,[15] the difficulties of judgment are further compounded: A stop will be found proper where the information before the officer can be squared *equally* with a criminal or innocent explanation. *In re Tony C.,* 21 Cal.3d 888, 894 (1978).

Section 647(e) thus provides inadequate notice as to when an individual will lawfully be required to "produce reliable identification." Regardless of how innocent his planned conduct may be, an individual can secure no sufficient guidance to determine whether he will at some point be the proper subject of a *Terry*-stop; nor will he be able to forecast the conduct and circumstances that will satisfy the *Terry* standard to a trained officer. *See Palmer v. City of Euclid,* 402 U.S. 544, 546 (1971).

The fact that the State must prove the defendant was "loitering or wandering" in addition to proof "that the public safety demands identification" to establish a violation of Section 647(e), *see People v. Solomon, supra,* 33 Cal.App.3d at

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[14] Members of panels of Courts of Appeals have similarly disagreed. *Compare, e.g.,* majority *with* dissenting opinions in *United States v. Corona,* 661 F.2d 805 (9th Cir. 1981), *United States v. Ceballos,* 654 F.2d 177 (2nd Cir. 1981), and *United States v. White,* 648 F.2d 29 (D.C. Cir. 1981).

[15] *See, e.g., United States v. Holland,* 510 F.2d 453, 455 (9th Cir.), *cert. denied,* 422 U.S. 1010 (1975).

435, does not cure this impermissible vagueness. In *People v. Weger,* 251 Cal.App.2d 584 (1967), the California Court of Appeal held that the words "loitering or wandering" as used in Section 647(e) "do not connote unlawful activity. They do no more than describe the person who may be asked by a peace officer to identify himself." *Id.* at 592-93. That interpretation is consistent with the practical application of the statute, as demonstrated by Lawson in the trial court. (*See* R.T. 131-32, 251-52.)

Indeed the Court in *People v. Solomon* recognized that the "loitering or wandering" element of the section was substantially similar to the loitering statutes invalidated on vagueness grounds in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), and *Palmer v. City of Euclid,* 402 U.S. 544 (1971). It was only the so-called "third element" of Section 647(e)—proof that the surrounding circumstances suggest to a reasonable man some impairment of the public safety within the meaning of *Terry v. Ohio*—that led the California Court of Appeal to conclude that the statute was not unduly vague. *People v. Solomon, supra,* at 438-39. However, the *Terry* standard itself falls short of providing constitutionally adequate notice when used as the basis for imposing criminal liability.

Appellants' discussion of vagueness wholly fails to address the issue whether a detained individual has been provided adequate notice to permit him to determine if he must provide reliable identification. Although in both *Brown v. Texas, supra,* and *Norwell v. Cincinnati, supra,* this Court held that a nonprovocative refusal to cooperate with the police is not punishable if the detention was improper, an individual detained pursuant to Section 647(e) has insufficient guidance to make that evaluation.

Of course it is true, as Appellants argue, that an individual detained by a police officer and to whom the request for identification is directed is, at that moment, "put on immediate notice of what section 647, subdivision (e) requires." Brief for Appellants, p. 21. But what the individual does not know is

whether he must comply with the request or commit a crime. *See Lawson v. Kolender,* Appendix to Jurisdictional Statement, A-36 to A-37, 658 F.2d at 1370 (the person is "without any basis for determining whether the denial constitutes a violation of the statute"). Moreover, even if the statute provided that officers inform individuals of the grounds for the *Terry*-stop, the vagueness problem would endure. For the reasons stated previously, lay persons would be ill-equipped to make meaningful judgments regarding the appropriateness of the detention. The practical result is that an individual must comply or risk arrest and conviction.

Indeed, even at the point of detention and demand for production of identification, Section 647(e) fails to provide fair notice. The California appellate courts have never defined the nature of the identification required, holding only that it must be "reliable" and "genuine." *E.g., People v Solomon, supra,* 33 Cal.App.3d at 438. Section 647(e) is clear as to what is required only if one goes beyond any limiting construction given by the California courts and assumes (without any basis for doing so) that the identification required is in the form of a driver's license or a passport—a government-issued, uniformly recognized and accepted proof of identity. *But cf. Aptheker v. Secretary of State, supra,* 378 U.S. at 519 (Douglas, J., concurring) ("the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States"). Absent such a construction of the identification requirement—which would effectively compel individuals to maintain such government-issued proof upon their persons at all times—individuals are left to speculate as to the nature of the proof of identity they are required to disclose under the statute. The law is thus impermissibly vague upon this additional ground as well.

3. *The Indefinite* Terry *Standard Encourages the Arbitrary Enforcement of Section 647(e)*

"[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of

the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574, (1974). As the Court in *Goguen* explained:

> "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. *E.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-169 (1972). In *Gregory v. City of Chicago*, 394 U.S. 111, 120, Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' " *Id.* at 575.

Incorporation of the highly indefinite *Terry* standard into a penal statute necessarily—and in fact designedly[16]—transforms "the moment-to-moment judgment of the policeman on the beat" into a process of lawmaking. As previously discussed, Section 647(e) does not plainly define those specific instances when an individual must furnish reliable evidence of identity: that determination is left to the "inferences" and "deductions" that a "trained officer draws" from his "various objective observations," and other data available to him at any particular time. *United States v. Cortez, supra*, 449 U.S. at 418. Illegality is thus defined in subjective terms, requiring in each instance an *ad hoc* police determination of criminality.[17]

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[16] The standard was expressly formulated to "deal . . . with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio, supra*, 392 U.S. at 20. *Cf. Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

[17] The statute invites discriminatory enforcement in yet another way: Absent standards of sufficient definiteness, different officers will treat identical situations differently. Officers cannot reasonably be expected to assemble or interpret "the whole picture" in the same manner. *Cf. United States v. Cortez, supra*, 449 U.S. at 418.

The record in this case vividly demonstrates the vice of permitting the police to enforce such a standardless criminal statute. In less than two years, Lawson was detained on no fewer than fifteen occasions pursuant to Section 647(e). Of those detentions, none resulted in arrest and prosecution for offenses other than Section 647(e). Only three resulted in prosecutions under that section. Two of those cases were dismissed.

Lawson has been detained while walking near closed businesses because he was in an area in which it was uncommon to see black persons. (R.T. 160.) He was arrested while hitchhiking at a freeway on-ramp because the police officer suspected he might be an escapee from a mental hospital, an escaped felon from another state or somebody who felt he could avoid police pursuit by "being intolerable." (R.T. 331.) Lawson and another black male were removed from a restaurant—where they were the only black persons eating—and questioned because the police were looking for a one-legged white man. (R.T. 14-16.) In each of these instances—as well as the other detentions described in the Statement of the Case—Section 647(e) authorized the police to engage in highly selective and arbitrary enforcement practices. Such a use of Section 647(e) makes it no better than a "street-sweeping" statute, designed to do indirectly what could not constitutionally be done directly: namely, to remove "suspicious" persons from the public streets despite the absence of any legal justification.

The arbitrary and discriminatory enforcement of Section 647(e) experienced by Lawson is fully consistent with field research, which demonstrates that statutes like Section 647(e), and the standard which it incorporates, have been discriminatorily applied to members of minority groups and of groups espousing unpopular causes:

> "Misuse of field interrogations, however, is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive control' in which officers are

> encouraged to stop routinely and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 184 (1967), quoted in part in *Terry v. Ohio, supra,* 392 U.S. at 14 n.11.

See M. Brown, *Working the Streets: Police Discretion and the Dilemmas of Reform* 163-69 (1981) ("Race, the field observations reveal, is one of the most salient criteria to patrolmen in deciding whether or not to stop someone."); *id.* at 171-77 and 196-98 (police more likely to arrest someone who withholds deference). *See generally* Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 *Crim.L.Bull.* 544, 552-53, 567-74 (1976); Tiffany, McIntyre & Rottenberg, *Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* 38-43 (1967); Burkoff, "Non-Investigatory Police Encounters," 13 *Harv.C.R.-C.L.L.Rev.* 681, 689, 690 & n.39, 705-10 & n.125 (1978).

Discriminatory enforcement of Section 647(e) is further encouraged by the vagueness surrounding the requirement of "credible identification." Governmentally approved identification documents, such as a driver's license or passport, presumably satisfy the requirement. Those who do not drive or travel abroad—typically the less affluent--are less likely to be able to satisfy a particular officer's demand for reliable proof of identity and are thus more likely to be arrested for violating Section 647(e).

In *Papachristou v. City of Jacksonville, supra,* this Court held that a "direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster." 405 U.S. at 169. Such a statute, the Court found, "furnishes a convenient tool for 'harsh and discriminatory enforcement by . . . officials, against particular groups deemed to merit their displeasure.' " 405 U.S. at 170 (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940)).

Section 647(e) is no more precise than the ordinance invalidated in *Papachristou*. Indeed, it is simply a direction to the police by the California Legislature to arrest all suspicious individuals who refuse or are unable to dispel suspicion by providing reliable proof of identity.

Section 647(e) permits and encourages arbitrary and discriminatory enforcement of the law. As such, it is plainly unconstitutional.

II. SECTION 647(e) VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Imposition of criminal sanctions for the refusal to produce reliable proof of identification, when the demand for identification is made without probable cause to believe an offense has been committed, violates the Fourth Amendment rights of individuals "to be secure in their persons, houses, papers and effects . . ."[18]

This Court has stressed many times "[t]he central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees." *Henry v. United States*, 361 U.S. 98, 100 (1959). As stated, for example, in *Dunaway v. New York*, 442 U.S. 200, 208 (1979):

> "The 'long-prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.' " (brackets in original) (quoting from *Brinegar v. United States*, 338 U.S. 160 (1949)).

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[18] The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is applicable to state action as part of due process guaranteed by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

The Fourth Amendment's protection of the right to privacy and its safeguards against unreasonable searches and seizures are not shed simply because an individual leaves his or her home to walk on the streets. *See, e.g., Terry v. Ohio, supra,* 392 U.S. at 8-9:

> "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,
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> > 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' *Union Pac. R. Co. v. Botsford,* 141 U.S. 250, 251 (1891)."

Although the Court in *Terry* created an exception to the principle that seizures of the individual must be based on probable cause, the standard of probable cause continues to govern. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York, supra,* 442 U.S. at 210. *See also Michigan v. DeFillippo, supra,* 443 U.S. at 44 (Brennan, J., dissenting) ("[T]he authority of police to accost citizens on the basis of suspicion is 'narrowly drawn.'") (quoting from *Terry v. Ohio,* 392 U.S. 1, 27 (1968)).

Section 647(e)'s requirement that proof of identity be disclosed upon no more than satisfaction of the *Terry* criteria of reasonable suspicion represents an unwarranted departure from the probable cause standard. The section effectively undermines the probable cause standard by sanctioning an arrest where there is insufficient grounds to arrest the suspect for the underlying offense that was the predicate to the initial stop. *Lawson v. Kolender, supra,* Appendix to Jurisdictional Statement, A-17 to A-21, 658 F.2d at 1366-67. When a suspect

refuses to provide proof of identity, Section 647(e) impermissibly allows an officer to conduct a complete search incident to arrest, even though he has only a suspicion of underlying criminal activity. In addition, as the Ninth Circuit held, Section 647(e)'s serious intrusion on personal security and mobility outweighs the speculative possibility that identification may provide a link leading to arrest. Appendix to Jurisdictional Statement, A-21 to A-27, 658 F.2d at 1367-68.

"A central concern [of the Fourth Amendment] in balancing . . . competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas,* 443 U.S. 47, 51 (1979). *See also Steagald v. United States,* 451 U.S. 204, 212, 215-16 (1981); *See v. Seattle,* 387 U.S. 541, 545 (1967); *Wolf v. Colorado, supra,* 338 U.S. at 27. Section 647(e) loosens constitutional control over discretionary police conduct. By investing a general investigative statute with criminal sanctions (*see* Brief for Appellants, pp. 17-18), it substitutes standards for investigatory activities in place of the constitutional standards imposed by the Fourth Amendment.

A. Section 647(e) Impermissibly Allows the Police To Circumvent the Requirement of Probable Cause To Arrest and To Search Incident to an Arrest

The broad *Terry* standard for investigative stops, when incorporated as the central element of Section 647(e), not only encourages arbitrary and discriminatory enforcement in violation of due process, *see* Section I, B, above, but also allows the requirement of probable cause for arrest and for a search incident to arrest to be subverted—if not technically,[19] then

[19] Of course, where an individual refuses or is unable to produce proof of identity, probable cause to arrest under Section 647(e) exists. But as this section of Appellee's Brief demonstrates, permitting an arrest and search upon this type of "probable cause" defeats the established Fourth Amendment distinction between the probable cause and *Terry*-"reasonable suspicion"

functionally so as to violate the Fourth Amendment. Section 647(e) facilitates pretextual arrests and searches where insufficient bases exist to arrest the suspect for the underlying offense that justified the initial stop.

If, as this Court has unanimously held, "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster," *Papachristou v. City of Jacksonville,* 405 U.S. 156, 169 (1972), then a blanket direction to arrest all "suspicious" persons who refuse or are unable to dispel the suspicions officially perceived as to their activities should be similarly "foreign to our system." *Ibid.* For persons who refuse to identify themselves, the police still lack more than "a particularized and objective basis for suspecting [them] . . . of criminal activity." *United States v. Cortez, supra,* 449 U.S. at 417-18. Certainly the mere refusal to identify will not add enough to a *Terry*-based suspicion to give rise to probable cause to arrest for the underlying activity that prompted the stop.

Section 647(e), at its core, makes criminal an individual's refusal to allay an officer's suspicions regarding that individual or his conduct. Even accepting *arguendo* Appellants' formulation of the statute as both a deterrent and an aid to investigation, the sole intent of the law's identification requirement is to find out who the person under detention is—to increase police knowledge about that individual. As Appellants acknowledge, the statute is otherwise useless: "Once the citizen provides identification to the police, without more facts brought to the attention of the officer, the citizen is free to go." (Brief for Appellants, p. 17.)

Section 647(e) therefore creates "a crime out of what under the Constitution cannot be a crime." *Michigan v. DeFillippo, supra,* 443 U.S. at 45 (Brennan, J., dissenting) (quoting *Coates v. Cincinnati,* 402 U.S. 611, 616 (1971)). *Cf. Thompson v. City of Louisville,* 362 U.S. 199 (1960); *Norwell v. Cincinnati,* 414 U.S. 14 (1973). It manufactures probable cause from the edge of the *Terry* standard. As the Ninth Circuit

held, Appendix to Jurisdictional Statement, A-17, 658 F.2d at 1366, "as a result of the demand for identification, [the statute] bootstrap[s] the authority to arrest on less than probable cause":

> "It authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result by making suspicious conduct a substantive offense." *Id.* at A-20, 658 F.2d at 1367 (quoting from *Powell v. Stone,* 507 F.2d 93, 96 (9th Cir. 1973), *rev'd on other grounds,* 428 U.S. 465 (1976).)[20]

Section 647(e) likewise collapses the probable cause requirement for a search incident to arrest into the *Terry* standard. In *United States v. Robinson,* 414 U.S. 218, 227-28 (1973) (quoting from *Terry v. Ohio, supra,* 392 U.S. at 21-22), this Court stressed the "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons":

> "The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, is also justified on other grounds, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause . . . must . . . be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . ." (Citations omitted.)

Section 647(e) undoes this distinction for persons detained under its provisions. Since "[n]othing in *Terry* can be understood to allow . . . any search whatever for anything but

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[20] For these reasons, if Section 647(e) is constitutional, then a similar statute defining as criminal the refusal of an individual to empty his pockets where the *Terry* standard is satisfied should also be constitutional. "Clearly, this is a sheer piece of legislative legerdemain not to be countenanced." *Michigan v. DeFillippo, supra,* 443 U.S. at 45 (Brennan, J., dissenting).

weapons," *Ybarra v. Illinois,* 444 U.S. 85, 93-94 (1979), an officer typically cannot examine the contents of a wallet or purse for proof of a subject's identity where probable cause to arrest does not first exist.[21] However, under Section 647(e) persons to whom the demand for proof of identification is directed are unable to rely upon this constitutional standard. For even when no probable cause to arrest exists, they must either themselves furnish the proof, or, as Appellants concede (indeed, assert), where a "request for identification is refused, the police may take the person's wallet and determine for themselves the citizen's identity." (Brief for Appellants, p. 19.) The law cannot reach into an individual's pocket to obtain proof of identity on the *Terry* standard alone, so Section 647(e) requires the individual to do the reaching for the police. Where the individual objects, the law then finds "independent probable cause" within itself, and thereby proceeds *now* to authorize the police to reach into the pocket. *See Michigan v. DeFillippo, supra,* 443 U.S. at 46 (Brennan, J., dissenting). The search consequently takes place unconstitutionally—without the suspicions justifying the stop and demand for identification ever ripening into probable cause.

B. Section 647(e)'s Intrusion on Important Constitutional Interests in Personal Security, Mobility and Privacy Outweighs Its Speculative Law Enforcement Value

Even where application of Section 647(e) does not culminate in an arrest, the enforcement of its identification requirement significantly impairs the exercise of constitutionally protected interests in personal security, mobility and privacy, as demonstrated in Section I,A, above: "In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest [in preventing crime] and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas,* 443 U.S. 47, 52 (1979).

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[21] *See, e.g., People v. Harris,* 105 Cal.App.3d 204, 213-216 (1980) (search of contents of purse lawful where incident to arrest).

The balance between constitutional rights and crime prevention does not shift by conditioning the demand for proof of identity upon the police first establishing a *Terry* basis for detention. As this Court has suggested on several occasions, "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi,* 394 U.S. 721, 727 n.6 (1969); *see also Dunaway v. New York, supra,* 442 U.S. at 210 n.12 (quoting concurring opinion of White, J., in *Terry v. Ohio, supra,* 392 U.S. at 34):

> "[G]iven the proper circumstances . . . [a] person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . ."[22]

1. *Section 647(e) Authorizes a Significant Intrusion on Constitutionally Protected Interests*

The test of reasonableness under the Fourth Amendment "requires a balancing of the need for the particular search [or seizure] against the invasion of personal rights that the search [or seizure] entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979).

Intrusions upon protected interests where officers lack probable cause to arrest have always been "brief and narrowly circumscribed." *Dunaway v. New York, supra,* 442 U.S. at 212. Here, the interference is materially different. By transforming refusal to answer into a basis for arrest, Section 647(e) effectively compels answers from persons who are unwilling to sacrifice their liberty in order to maintain their rights of privacy, security and mobility. In such cases Section 647(e) functions as a "suspicious persons' registration act," authorizing the police

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[22] *See also* ALI Model Code of Pre-Arraignment Procedure Sections 110.1 and 110.2, and corresponding Commentary (1975) (duty of person detained and questioned by police to cooperate is moral, not legal; detainees must be informed no legal obligation exists to respond to questioning).

to collect the names of individuals although their only reason for appearance in law enforcement files may be the exercise of constitutional rights.

In contrast to the pat-down search authorized by *Terry v. Ohio,* seizures[23] pursuant to Section 647(e) are peculiarly personal, directed specifically toward the individuals against whom the police apply its identification requirement. The intent of the statutory intrusion, after all, is discovery of the person's identity—and proof of that identity. The frisk, while concededly "a severe, though brief, intrusion upon cherished personal security" (392 U.S. at 24), nonetheless constitutes an immediate and limited incursion upon an anonymous person. State intervention through a pat-down finishes with its administration: police know no more about the subject of the search than they did moments before.

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[23] The Fourth Amendment clearly applies to a proper application of Section 647(e). Although a police officer might theoretically ask for identification without having "detained" the individual, Section 647(e) applies only where there are detentions or investigatory stops of persons reasonably suspected of criminal activity. *See People v. Solomon,* 33 Cal.App.3d 429 (1973). As this Court held in *United States v. Cortez, supra,* at 417.

> "The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. *Reid v. Georgia,* 448 U.S. 438 (1980); *United States v. Brignoni-Ponce, supra,* at 878; *Davis v. Mississippi,* 394 U.S. 721 (1969); *Terry v. Ohio,* 392 U.S. 1, 16-19 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *Brown v. Texas,* 443 U.S. 47, 51 (1979); *Delaware v. Prouse,* 440 U.S. 648, 661 (1979); *United States v. Brignoni-Ponce, supra,* at 884; *Adams v. Williams,* 407 U.S. 143, 146-149 (1972); *Terry v. Ohio, supra,* at 16-19." (Footnote omitted.)

See also Terry v. Ohio, supra, 392 U.S. at 16, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

> "In contrast, police knowledge of the identity of an individual they have deemed 'suspicious' grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended. Information concerning the stop, the arrest and the individual's identity may become part of a large scale data bank." *Lawson v. Kolender, supra,* Appendix to Jurisdictional Statement, A-25 to A-26, 658 F.2d at 1368.

The California District Attorney's Association acknowledges that information from this required identification disclosure is typically recorded and maintained so that "if it later develops that the individual is sought regarding an offense, there is a reasonable possibility of locating the person." (Brief for Amicus CDAA, p. 52.) If, as is common, police check to determine whether the detained person has had prior contact with law enforcement, there results additional intrusion causing significant delay past the showing of proof.[24]

A frisk "must surely be an annoying, frightening, and perhaps humiliating experience," *Terry v. Ohio, supra,* 392 U.S. at 25, possibly more so than enforcement of the Section 647(e) identification requirement. But this acknowledgment does not diminish the significant impact of Section 647(e) upon the detained person. For the individual stopped knows, as do those observing, that wrongdoing is strongly connoted by his act of

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[24] *See, e.g.,* Model Code of Pre-Arraignment Procedure Section 110.2(1) and (5) (1975) (twenty minute detention permitted); Reiss & Black, 374 *Annals* 47, 52 (1967):

> "About one-half of the suspects were detained for less than ten minutes and three-fourths for less than twenty minutes. Nearly all these persons were released in the field setting. Over nine-tenths of the suspects were detained less than forty minutes; nevertheless, about 5 percent were detained an hour or more before the police made a decision to book or release."

Detentions of Lawson for the purpose of securing proof of identity typically lasted from between five and twenty minutes, occasionally longer. See pages 5-6, above.

reaching upon his person to secure a driver's license or similar identification paper, followed by its production to the police for record-copying.

Other investigatory procedures such as fingerprinting "need not come unexpectedly or at an inconvenient time," because there is no danger of destruction of fingerprints. *Davis v. Mississippi, supra,* 394 U.S. at 727. As the record in this case repeatedly demonstrates, the intrusion at issue here is not so accommodating.[25]

2. *Section 647(e) Does Not Meaningfully Advance Any Significant Governmental Interest in Crime Prevention*

To determine whether the identification requirement of Section 647(e) satisfies Fourth Amendment strictures, it is necessary to balance the intrusions upon individual rights just described against "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." *Camara v. Municipal Court,* 387 U.S. 523, 534-35 (1967). Appellants here assert broad interests of crime detection and prevention in support of the statute. (Brief for Appellants, p. 18). This Court, however, is asked to accept such a generalized justification for intrusions on recognized constitutional interests on faith, without benefit of analysis:

> "Logic alone dictates that an officer with sufficient basis to ask for identification would be completely frustrated in preventing or detecting criminal behavior if his request could be ignored with impunity." *Ibid.*

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[25] *See, e.g.,* R.T. 16 (Lawson asked to exit restaurant for questioning); R.T. 47 & 306 (Lawson stopped twice within one hour while trying to leave San Diego by hitchhiking); R.T. 65 (Lawson stopped near midnight while walking home); R.T. 20 (Lawson stopped between 12:00 and 4:00 a.m. while walking near all-night businesses).

Fairly examined, it is hard to understand how "logic alone" could dictate a "complete frustrat[ion]" of crime prevention or detection where an individual refuses to furnish proof of identity. Since the majority of jurisdictions have not enacted laws like Section 647(e), logic and experience both suggest that the statute is far from necessary. Moreover, even in California any such refusal to identify typically will not bring an end to an officer's investigation. Indeed, given the practical unlikelihood of many such refusals, it would instead presumably "alert the officer to the need for continued observation." *Terry v. Ohio, supra,* 392 U.S. at 34 (White, J., concurring).[26] The officer's awareness of this need doubtlessly would also be communicated to any subject under detention who hesitated to provide identification.

Thus, while prevention of crime is a "weighty social objective," *Brown v. Texas, supra,* 443 U.S. at 52, it is unclear to what degree making criminal the refusal to disclose identification will itself further that objective or the objective of crime detection.[27] Notably, field studies that have even remotely

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[26] Of course, in certain instances a trained officer would presumably deduce that refusals to furnish identity stem from the desire to preserve one's rights of personal security, privacy and mobility.

[27] The study from the Rand Corporation, cited in the Brief for Amicus CDAA at pages 32-36 (and fully reported and analyzed by the authors in P. Greenwood, J. Chaiken, and J. Petersilia, *The Criminal Investigation Process* (1977)) does not conclude that identification of detainees assists crime detection or prevention. Indeed, the study did not even specifically research field interrogations on *Terry*-type circumstances. The table at page 37 of the CDAA brief (Greenwood, *et al., supra,* at p. 135), for instance, examined successful apprehension of criminals *where police had probable cause-plus to arrest:* for example, arrests at the scene, often because the criminal had been captured by the victim or a private security officer; complete identifications from the victim and/or witness, often by name and physical characteristics; or uniquely linking evidence, like the criminal's wallet left behind at the crime scene.

considered the issue have concluded that the net benefit to law enforcement may be marginal at best.[28]

Further, the interests assertedly served by identification requirements—crime prevention and detection—have never been found by this Court to be sufficient by themselves to justify a seizure beyond an initial stop upon less than probable cause. In *Terry v. Ohio, supra,* 392 U.S. at 23-24, the brief detention of an individual to permit officers a limited frisk for weapons was premised upon "the neutralization of danger to the policeman in the investigative circumstance." *Id.* at 26.[29] At issue then was much more than the "general interest . . . of effective crime prevention and detection" (*id.* at 22):

> "[I]n addition, there [was] the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could . . . be used against him." *Id.* at 23.[30]

The purpose of the pat-down was to enable the police to carry out the investigation in safety, not, as here, to compel the detainee to assist actively the purpose of the stop. "The sole

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[28] *See* Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 *Crim.L.Bull.* 544, 500-53, 574 (1976); H. More, Jr., *Critical Issues in Law Enforcement* 122-23, 181 (1975); Burkoff, "Non-Investigatory Police Encounters," 13 *Harv.C.R.-C.L.L.Rev.* 681, 707-714 (1978); *see also* pages 27-28, above. More generally, the study by Greenwood, *et al.* could not identify any research which adequately measured the extent of deterrence that resulted from police practices deliberately making offenders aware that crimes they had committed were under investigation. *Id.* at 31.

[29] *See also id.* at 24. Cases following *Terry* have consistently repeated this basis for permitting the frisk. *See, e.g., Ybarra v. Illinois,* 444 U.S. 85, 93 (1979); *Dunaway v. New York, supra,* 422 U.S. at 209-10; *Pennsylvania v. Mimms,* 434 U.S. 106, 110 (1977); *Adams v. Williams,* 407, U.S. 143, 146 (1972).

[30] The *Terry* Court described as

> "[t]he crux of th[e] case . . . not the propriety of . . . taking steps to investigate . . . suspicious behavior, but rather, whether there was justification for . . . invasion of . . . personal security . . . [to search] for weapons in the course of that investigation." 392 U.S. at 23.

justification of the search in the present situation is the protection of the police officer and others nearby . . . ." *Terry v. Ohio, supra,* 392 U.S. at 29.

Even the brief detentions of automobiles near Mexico to inquire about the citizenship of the occupants held constitutional in *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975), were based upon more than the general interest in investigating crime. The government there made "a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican borders" (422 U.S. at 878), since "aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." *Id.* at 878-79.[31]

In sum, although the generalized justifications offered in this case to uphold Section 647(e) were also asserted in those cases involving the few exceptions to the probable cause requirement previously sanctioned, the Court has always rested those exceptions upon far narrower and more compelling concerns. Here no such concerns exist. Moreover, the proce-

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[31] In balancing the asserted governmental interests against the infringement of constitutional rights, this Court must also assess the substantiality of those interests and the relationship of an identification requirement to them. Under Section 647(e), police are authorized to demand and obtain by use of criminal sanction identification when there is suspicion of criminal activity. This suspicion may relate to such serious criminal behavior as robbery, murder or other violent crimes, but it may equally relate to such nonviolent criminal activity as was allegedly involved here, such as soliciting door-to-door without a license or hitchhiking in the roadway. By any equation, the State's interest in identification of individuals suspected of many offenses is therefore far less substantial than the constitutional rights of personal security, mobility and privacy. *See generally* ALI Model Code of Pre-Arraignment Procedure § 110.2(1)(a)(i) and Commentary, pp. 273-78(1975) (limiting suspicious circumstances in which stop is authorized to those involving "danger of forcible injury to persons or of appropriation of or damage to property"); Keenan, "California Penal Code Section 647(e): A Constitutional Analysis of the Law of Vagrancy," 32 *Hastings L.J.* 285, 300 (1980).

dure at issue here is far less effective at serving the broad interests of crime prevention and detection than were the procedures at issue in earlier cases.

III SECTION 647(e) VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The Section 647(e) requirement of disclosure of proof of identity frustrates Fifth Amendment protection against "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." *United States v. White,* 322 U.S. 694, 698 (1944).[32] The constitutional guarantee means, of course, that

> "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *Ibid.*

See aiso Miranda v. Arizona, 384 U.S. 434, 460 (1966). The Fifth Amendment safeguards the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan,* 378 U.S. 1, 8 (1964).

Section 647(e) is more than a simple stop-and-identify statute, requiring only that persons subjected to a *Terry* detention provide their names. Rather, the law also demands that suspects provide:

> "a genuine identification, one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *People v. Solomon, supra* 33 Cal.App.3d at 438.

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[32] The Fifth Amendment privilege against compulsory self-incrimination is protected by the Fourteenth Amendment against abridgment by the states. *Malloy v. Hogan,* 378 U.S. 1, 6 (1964).

To provide a means for the police to find him at a later time, a suspect therefore necessarily has to furnish an address and/or a phone number. He may also be compelled to account for his presence "to the extent it assists in producing credible and reliable identification." *Ibid.*

This Court has recognized that statements compelled by law are "the essence of coerced testimony."

> ". . . In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination." *New Jersey v. Portash,* 440 U.S. 450, 459 (1979).

Here too, more even than if police resorted to sophisticated techniques of custodial interrogation *(see Miranda v. Arizona, supra,* 384 U.S. at 448-57), it is the force of the law that extracts proof of identity from the suspect under *Terry* detention. There is no right to remain silent where silence receives a criminal sanction.

Not every statute demanding that individuals furnish proof of identity intrudes impermissibly upon the right against compulsory self-incrimination. There are many instances where "[d]isclosure of name and address is an essentially neutral act." *California v. Byers,* 402 U.S. 424, 432 (1971) (plurality opinion). The critical inquiry is whether the disclosure requirement is directed to the public at large and is intended to further a noncriminal regulatory scheme or whether the requirement is

instead limited to a "highly selective" group or one "inherently suspect of criminal activities" and is designed to facilitate criminal convictions. *Id.* at 430-31.

Statutes like the California Vehicle Code provision at issue in *Byers,* compelling drivers of vehicles involved in accidents to identify themselves to owners of injured property, can "define some criminal offenses, [but remain]. . . essentially regulatory, not criminal." *Id.* at 430. Such laws, for example, are "not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities"—there, "arising from automobile accidents." *Ibid.* They are not directed at "a 'highly selective group inherently suspect of criminal activities,' " and are intended to be utilized not in " 'an area permeated with criminal statutes' " but in " 'an essentially noncriminal and regulatory area of inquiry.' " *Ibid.* (quoting from *Albertson v. SACB,* 382 U.S. 70, 79 (1965)). *See also Garner v. United States,* 424 U.S. 648, 662 n.16 (1976) (*Byers* plurality "hold[s] only that requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the [Fifth Amendment] privilege").

By contrast, Section 647(e)—no less than the statutes struck down in *Haynes v. United States,* 390 U.S. 85 (1968), *Grosso v. United States,* 390 U.S. 62 (1968), *Marchetti v. United States,* 390 U.S. 39 (1968), and *Albertson v. SACB, supra*—is steeped in the criminal, not regulatory, area of inquiry. Individuals against whom the police apply the statute form a grouping vastly different from the neutral *Byers* class of "all persons who drive automobiles in California." *Id.* at 430. Rather, these persons are all "suspect of criminal activities"; they could not otherwise be detained under *Terry v. Ohio, supra,* 392 U.S. at 30. Appellants themselves recognize the relationship of this statute to detection and prosecution of criminal activities. Indeed, they go so far to state that "an officer with

sufficient basis to ask for identification would be completely frustrated in preventing or detecting criminal behavior if his request could be ignored with impugnity." (Brief for Appellants, p. 18.)[33]

Disclosure of one's name and address in circumstances where Section 647(e) is enforced involves "real and appreciable" hazards of self-incrimination. *See Haynes v. United States, supra,* 390 U.S. at 97.[34] It requires little imagination to devise a scenario by which information called for under the accounting-for-presence provision directly contravenes the Fifth Amendment.[35] An officer receives a report that a burglary has occurred. The suspect is described as a tall, slender, long-haired black male,[36] wearing dark clothing, and last seen

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[33] *See also* Brief for Amicus CDAA at page 4:

"th[e] identification is frequently crucial in the successful prosecution of many offenses. It is the rapid identification of the perpetrator which frequently makes the difference between a successful prosecution and no prosecution."

[34] Two decisions—one by this Court, *Kirby v. Illinois,* 406 U.S. 682 (1972), and one by the District of Columbia Circuit, *United States v. Purry,* 545 F.2d 217 (D.C. Cir. 1976)—illustrate these hazards. In *Kirby* a lawfully stopped suspect produced credentials of a mugging victim upon an officer's demand for identification; in *Purry* officers requested identification from a suspect whose wallet they had discovered at the scene of a crime. In each case production of proof of identity provided a "link in the chain" of evidence supporting an eventual conviction. In both cases a statutory requirement of self-identification would therefore have constituted compelled self-incrimination in violation of the Fifth Amendment rights of the detained suspect. *Cf. Hoffman v. United States,* 341 U.S. 479, 486 (1950); *United States v. Burr,* 25 Fed. Cases 38 (1807). *See generally* Note, "Stop and Identify Statutes: A New Form of An Inadequate Solution to an Old Problem," 12 *Rutgers L.J.* 585, 602-03 (1981).

[35] The constitutional problems attendant to the accounting-for-presence provision are manifest and perhaps explain why Appellants neglect to discuss its meaning. The clause, even as construed in *Solomon,* is impermissibly vague: It offers absolutely no basis to determine what will constitute a satisfactory accounting in the absence of sufficient documentation of identity. *See generally* Part I, above. *See also* fn. 5, above.

[36] *See, e.g.,* R.T. 154, 313 (officers with knowledge of crime reports involving black male suspects detain Lawson for investigation).

heading north. The officer observes an individual matching the general description who is hitchhiking. Possessed with enough facts to meet the *Terry* test, the officer detains the suspect and directs disclosure of proof of identity. The suspect replies that he is carrying no proof upon his person. The officer than requires the individual to "account for his presence."[37] If the subject answers that he has just left the general area of the burglary, lives in another section of the city and cannot provide sufficient explanation for his activities near the time of the burglary, he thereupon supplies the government with facts essential to assembly of a prosecution case.[38] If, however, the suspect does not respond to these questions (or does not respond to the satisfaction of the particular officer), he has committed a crime, is arrested and taken to jail.

Contrary to the prohibition against punishing silence set forth in *Malloy v. Hogan, supra,* Section 647(e) exacts a clear penalty for silence—arrest, jail, prosecution, and a criminal record. Failure to confess is a crime. If an individual may tend to incriminate himself by answering questions to provide "reasonable assurance" of his identity, he is subject to an impossible dilemma—incriminate himself of a crime by answering or commit a crime by remaining silent. The Fifth Amendment does not tolerate such an abuse of state power.

> ". . . our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent

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[37] *See, e.g.,* R.T. 120, 182, 268, 341, 348 (officers requiring Lawson to account for his presence ask why he was in area, where he was coming from, and what his destination was).

[38] A similar result would necessarily also obtain where a victim has identified a criminal perpetrator by name or where an outstanding warrant exists for a particular individual. *Cf. In re Grand Jury Proceedings (Jones),* 517 F.2d 666 (5th Cir. 1973) (attorney cannot be compelled to reveal identity of client where disclosure may be link in chain of evidence needed to prosecute client); *Tillotson v. Boughner,* 350 F.2d 663 (7th Cir. 1965) (same); *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960) (same).

labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona, supra,* at 460.

Since Section 647(e) directly contravenes the Fifth Amendment, reversing the constitutional allocation of prosecutorial responsibilities in our accusatorial system of justice, *see Tehan v. Shott,* 382 U.S. 406, 415 (1966), it must be invalidated.

IV. CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 81-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM KOLENDER, JOHN DUFFY,
H. A. PORAZZO, T. W. SWAIM,
C. R. WEBB, P. A. CHAMPION,
A. A. ATKINS, A. J. RUBIN,
C. D. ZIMMERMAN, J. O. LARSON,
JAMES E. MOULTON and ANGEL SANCHEZ,

Appellants,

v.

EDWARD LAWSON,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

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ARGUMENT

"PEDIGREE STATEMENTS" DO NOT CONSTITUTE SELF-INCRIMINATION

Appellee urges this Court that when a person must furnish identification or be arrested, his Fifth Amendment rights against self-incrimination are violated. Appellant would urge that in addition to the Court's reasoning in People v. Solomon (1973) 33 Cal.App.3d 429, state and federal courts have held such information to be "pedigree statements" and, therefore, do not come within the protection of the Fifth Amendment.

In California v. Byers (1971) 402 U.S. 424, 429, this Court held the person asked may not claim the protection of the Fifth Amendment unless the claimant is confronted with "'substantial hazards of self-incrimination'". "Pedigree statements" are not material to guilt or

innocence; therefore, the Fifth Amendment does not apply to a request for identification. (People v. Rodriguez (1981) 444 N.Y.S.2d 981, 984; United States ex rel. Hines v. LaValle (2d Cir. 1975) 521 F.2d 1109, 1112; Leach v. State (1981) 425 A.2d 234, 238; Grimes v. State (1980) 409 A.2d 767, 771.) The court sidestepped the issues in United States v. Berry (5th Cir. 1982) 670 F.2d 583, 604, fn. 28, but implied accord with the cases cited above.

* * * * *

CONCLUSION

For the reason set forth above, and those set forth in appellant's brief on the merits, appellants respectfully request the opinion of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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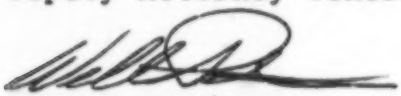

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v.

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I, Clifford Reed, being duly sworn, depose and say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within mentioned mailing occurred and not a party to the subject cause: my business address is 110 West "A" Street, Suite 700, San Diego, California 92101.

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Subscribed and sworn to before
me this 29th day of October, 1982.

Vida M Allen

Notary Public in and for
said County and State

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NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1984

Amicus Brief

1

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No. 81-1320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM KOLENDER in his capacity as Chief of Police of San Diego, et al., JOHN DUFFY, in his capacity as Sheriff of San Diego County, et al.,

Appellants,

and

H. A. PORAZZO in his capacity as Deputy Chief Commander of the California Highway Patrol, et al.,

Appellants,

v.

EDWARD LAWSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE APPELLANTS

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QUESTIONS PRESENTED

Whether a police officer conducting a lawful investigatory stop that satisfies Fourth Amendment standards can compel a person to identify himself.

Whether a request for identification constitutes a more substantial intrusion than a patdown search.

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE APPELLANTS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. George Deukmejian, Attorney General, State of California, Counsel for Appellants, and James R. Walsh, Esq., substituted Counsel for Appellee. Letters of Consent of the parties will be filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, consistent with constitutional requirements. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-two times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

AELE and IACP know well the problems faced by police officers in their good faith attempts to conduct investigatory stops that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to street confrontations between the police and those suspected of engaging in criminal conduct compels these organizations to speak on behalf of the law enforcement officers in this case.

STATEMENT

This appeal follows from a suit for damages under the Federal Civil Rights Act (42 U. S. C. § 1983) which was filed by appellee in the United States District Court for the Southern District of California. That court found the statute under which appellee was arrested (Cal. Pen. Code, § 647 (e)), violative of the Fourth Amendment of the Constitution of the United States. The matter was then appealed to the Court of Appeals for the Ninth Circuit which proceeded to affirm the ruling below that the California statute was unconstitutional. 658 F. 2d 1362 (9th Cir., 1981). Probable jurisdiction was noted by the United States Supreme Court on March 8, 1982. 30 Cr L 4237.

SUMMARY OF ARGUMENT

Amici contend that the challenge to the California statute involves important questions affecting law enforcement. In determining whether the intrusion authorized by the statute is "unreasonable," the degree of intrusion must be balanced against the public good sought to be served. A brief examination of other cases similar to the present one demonstrates that the intrusion in such cases is less substantial than those sanctioned in other areas of criminal law enforcement. In addition, the instant case has serious policy implications for law enforcement officers involved in common law investigatory stops because of the ruling below that a mere request for identification is a more substantial intrusion than a patdown search. *Amici* contend that law enforcement officers engaged in lawful Fourth Amendment investigatory stops are constitutionally permitted to compel a citizen to identify himself, and that a failure of the courts to recognize this power will make it virtually impossible for such officers to investigate crime. The ruling below that a request for identification is a more substantial intrusion than a patdown search is contrary to law, public policy, common sense and all reason.

ARGUMENT

I.

EFFECTIVE LAW ENFORCEMENT REQUIRES A RULING BY THIS COURT THAT WHEN A POLICE OFFICER IS CONDUCTING A LAWFUL INVESTIGATORY STOP THAT SATISFIES FOURTH AMENDMENT STANDARDS HE CAN COMPEL A PERSON TO IDENTIFY HIMSELF.

Amici will not reiterate at length the legal arguments made by the appellants in this case on the constitutionality of the statute, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide as they affect common law investigatory stops sanctioned by this Court fourteen years ago in *Terry* v. *Ohio*, 392 U. S. 1 (1968).

A police officer does not "seize" a pedestrian or motorist for Fourth Amendment purposes merely by approaching him and requesting that he answer a few questions and identify himself, see *United States* v. *Mendenhall*, 446 U. S. 544 (1980) and *Gomez* v. *Turner*, ____ F. 2d ____, 30 Cr L 4237 (D. C. Cir., 2/26/82). If a police officer has reasonable suspicion that a person has committed a crime, under *Terry* the officer can initiate an investigatory stop similar to that sanctioned by the California statute.

The noted commentator, Professor Wayne R. La Fave, has stated:

> It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry

> concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale.

La Fave, Search and Seizure, Vol. 3, 36-37 (1978)(footnotes and authorities cited omitted).

This Court has applied the principles set forth in *Terry* to the case of a police officer who had received information from an informant that a certain individual at a given location was carrying narcotics and a concealed weapon. *Adams* v. *Williams,* 407 U. S. 143, 144-145 (1972). In affirming the right of the officer to search in those circumstances, the Court observed that the Fourth Amendment "does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.* at 145. Further, in dealing with the question of reasonableness the Court observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146.

Indeed, it has even been held by the Supreme Court of Wisconsin that a police officer may conduct a limited search for

identification when a suspect in a proper *Terry*-type stop refuses to identify himself. *State* v. *Flynn*, 92 Wis. 2d 427, 285 N. W. 2d 710 (1979), cert. den., 449 U. S. 846. A limited search was approved as a permissible concommitant of *Terry* and the Wisconsin Stop and Frisk Statute (Wis. Stat. Ann. § 968.24). In its consideration of the above quoted language from *Adams*, the Wisconsin court said:

> It is important to note that neither *Adams* nor [the statute] limits the authority of a police officer acting with reasonable suspicion to simply stopping the suspected individual temporarily. In *Adams*, the court stated that an officer may stop a person under such circumstances "in order to determine his identity," and [the statute] provides that the officer "may demand the name and address of the person."
>
> Indeed, unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all. The suspect need only wait for what may be presumed to be a reasonable time, and then proceed on his way. Ignorant of even the person's name, the officer must either attempt to follow the suspect in the hope that he will discover some clue as to his identity, or surrender the potential lead and continue his investigation along other lines. Particularly where the officer is confronted with a number of potential suspects, limiting his options in this manner could have a perplexing effect on law enforcement efforts. * * *
>
> To accept defendant's contention that the officer can stop the suspect and request identification, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer granted by [the statute] and recognized by the United States Supreme Court in *Adams* * * * to identify a person lawfully stopped by him to a mere fiction. Unless the officer is given some recourse in the event his request for identification is refused, he will be forced to rely either upon the good will of the person he suspects or upon his own ability to simply bluff that person into thinking that he actually

> does have some recourse. In our view neither of these alternatives is satisfactory, nor is either called for under the Fourth Amendment.

92 Wis. 2d 427, 442-444, 285 N. W. 2d 710, 716-718.

Amici know, of course, that this Court has not ruled directly on the issue we address. Nevertheless, in *Brown* v. *Texas,* 443 U. S. 47 (1979), which involved a statute providing that a "person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information," this Court found that the officer lacked reasonable suspicion in that particular case, and concluded, therefore, that it "need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." And in *Michigan* v. *DeFillippo,* 443 U. S. 31 (1979), involving an arrest made under a similar ordinance, the Court, without reviewing the state court's determination that the ordiance was void for vagueness, concluded that the arrest was in any event lawful because made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional.

However, the clear implication of *Terry, Adams* and the weight of the state and federal authority indicate that in an otherwise valid *Terry*-type stop the police can compel a person to identify himself. As Professor La Fave notes, "[w]ithout even that bit of information, subsequent apprehension of the released suspect, if he is later shown to have perpetrated the suspected crime or some other offense, will usually be impossible." La Fave, *supra,* 1982 Supplement at 50. Moreover, the ALI Model Code of Pre-Arraignment Procedure, Commentary to § 110.2 at 270 (1975) makes the point "that a law enforcement officer will be confronted with many situations in which it seems necessary to acquire some further information from or about a person whose name he does not know, and whom, if

further action is not taken he is unlikely to find again." As La Fave notes again, *supra* at 51, there are two possible ways to accommodate this legitimate law enforcement need to obtain the identification of persons confronted in *Terry*-type stops: one alternative is to make refusal to give identification a crime in itself, as in the instant case, and the other is to apply the principle that a refusal to answer may in itself be a sufficiently suspicious circumstance to elevate a prior suspicion up to probable cause for an arrest and a full search. *Amici* submit that both alternatives are fully sanctioned by the Fourth Amendment.

The direct and immediate consequence that would flow from a holding, either under a statute similar to California or the common law stop and frisk power, that the police could not compel a person to identify himself, would seriously impair law enforcement efforts to afford the public adequate protection from criminal harm. In its 1977 report entitled "The Criminal Investigation Process: A Dialogue on Research Findings," the Rand Corporation made this observation on the crucial relationship of on-the-scene identification to successful law enforcement:

> Quite apart from the unreliability of arrest and clearance rates is the fact that they reflect activities of patrol officers and members of the public more than they reflect activities of investigators. Isaacs, Conklin and our own study showed that approximately 30 percent of all clearances are produced by pickup arrests by patrol officers who respond to the scene of the crime. In roughly another 50 percent of cleared crimes (less for homicide and auto theft), the perpetrator is known when the crime report is first taken, and the main jobs for the investigators are to locate the perpetrator, take him or her into custody, and assemble the facts needed to present charges in court. This means that around 20 percent of cleared crimes could possibly be attributed to investigative work, but we found that most of them were also solved by patrol officers,

> members of the public who spontaneously provide further information, or routine investigative practices that could also have been followed by clerical personnel.

Rand Corporation, "The Criminal Investigation Process: A Dialogue on Research Findings" (1977), Part IV, 6-7.

II.

A REQUEST FOR IDENTIFICATION DOES NOT CONSTITUTE A MORE SUBSTANTIAL INTRUSION THAN A PATDOWN SEARCH.

In *Terry* v. *Ohio* this Court approved patdown searches of suspects based upon reasonable suspicion, despite the acknowledgement that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U. S. at 24-25. The intrusion in the present case—a requirement of identification upon request following a lawful detention—is far less severe.

When border patrol officers reasonably suspect a particular vehicle may contain aliens illegally in the country, they may stop a vehicle and "question the driver and passengers about their citizenship and immigration status, and . . . ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881-882 (1975). The Court characterized such an intrusion as "modest," and observed that "[b]ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest." *Id.* at p. 880. In its analysis of the question, the Court relied heavily upon *Terry* and *Adams*. 422 U. S. at 880-884. An independent suspicion was first necessary for a stop and questioning, however, as the

Fourth Amendment forbids "stopping vehicles at random" and making inquiries and also, of course, "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." *Id.* at p. 884.

In *United States* v. *Martinez-Fuerte,* 428 U. S. 543, (1976), this Court determined that a brief detention of vehicles and occupants at routine checkpoints was permissible in light of the government interest sought to be served. *Id.* at 562. Such initial questioning in a stop, and further questioning following a secondary referral, were held to constitute an intrusion "sufficiently minimal that no particularized reason need exist to justify it. . . " *Id.* at 563.

It is clear that an identification requirement, serving important governmental interests, is proper in cases where there is reasonable suspicion of illegal activity. To characterize such an intrusion, however, as more severe or substantial than a pat-down search is contrary to law, public policy, common sense and all reason.

CONCLUSION

Amici submit that the decision of the courts below should be reversed on the facts and law, and on the basis of sound judicial policy.

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Amicus Brief

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No. 81-1320

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

WILLIAM KOLANDER, et al.

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal From The United States
Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA
and
BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA

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No. 81-1320

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

WILLIAM KOLANDER, in his capacity as Chief of Police of San Diego, JOHN DUFFY, in his capacity as Sheriff of San Diego County, WILLIAM J. WINTERS, in his capacity as Chief of Police of the City of Chula Vista, and H.A. PORRAZZO, in his capacity as Deputy Chief Commander of the California Highway Patrol,

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal From The United States
Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA

Pursuant to Rule 36 of the Rules of Supreme Court, the Appellate Committee of the California District Attorneys Association respectfully moves for leave of this Court to file the

attached Amicus Curiae brief in support of appellants. Three copies of the brief, together with this request, has been served upon each counsel in the instant case as well as the judge of the Federal District Court and the Ninth Circuit Court of Appeals. Again pursuant to Rule 36, of the Rules of the Supreme Court, the Amicus Curiae brief attached hereto is being conditionally filed with the instant motion for leave.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major

statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the committee has concluded that the outcome of this case will have a substantial impact upon the administration of criminal justice throughout California; accordingly, the committee has decided to move for leave of this court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is the authorized law officer of the County, which is a political subdivision of the State of California (see Rule 36(4)).

The central day-to-day function of the offices whose members constitute the California District Attorneys Association is to aid in the successful discovery, apprehension and prosecution of those who

commit crimes, the Association and its membership has a vital interest in supporting statutes which aid in this endeavor. Penal Code section 647(e), ruled unconstitutional for overbreadth by the courts below in the instant matter, is such a statute. The statute enables peace officers, under appropriate circumstances, to identify people at or around the actual scene of an investigation, at or about the time of the occurrence. This identification is frequently crucial in the successful prosecution of many offenses. It is the rapid identification of the perpetrator which frequently makes the difference between a successful prosecution and no prosecution. Given that Penal Code section 647(e) is a vital tool in the successful detection, apprehension and prosecution of criminal offenders, this Association has a keen interest in urging its validity.

In addition, amicus curiae has researched and analyzed both the precedent relied upon by the courts below as well as crucial cases construing the statute and feels that its analysis of the issues will be of unique assistance to this court in resolving the thorny issues of law presented by this case. A brief summary of argument follows this motion for leave and delineates the arguments made by amicus curiae in support of the constitutionality of Penal Code section 647(e) and, insofar as it further displays why the brief of amicus curiae is desirable, is incorporated herein.

For all of the above-stated reasons, it is urged that this court grant this motion for leave to file the Amicus Curiae brief which is attached hereto.

Respectfully submitted
on behalf of the
Appellate Committee of the
California District Attorneys
Association,

JOHN K. VAN DE KAMP
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By

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SUMMARY OF ARGUMENT

Penal Code section 647(e) defines as a misdemeanor the conduct of a person "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

In this brief, amicus curiae presents two central arguments in support of the constitutionality of Penal Code section 647(e):

First, Penal Code section 647(e) is not an ancient vagrancy statute born of an era of minimal civil liberties and a caste system with respect to those who come under the scrutiny of the law.

Penal Code section 647(e) is a response to the criticism of such statutes. It is narrowly drawn, and even more narrowly drawn by virtue of California appellate decisions. As drawn by the legislature and the courts, the statute is constitutional on both of the following counts:

1) The circumstances under which a peace officer may encroach upon an individual's privacy by detention are no broader than those circumstances endorsed by the United States Supreme Court in Terry v. Ohio (1968) 392 U.S. 1.

2) The conduct required in order to comply with the statute, to wit, providing identification, is, under the circumstances enumerated in the statute, a reasonable and limited exercise of legislative judgment which does not unduly encroach upon any cognizable interest of the individual.

ARGUMENT

THE SPECIFIC LANGUAGE OF PENAL CODE SECTION 647(e) AND THE NARROW CONSTRUCTION GIVEN THAT LANGUAGE BY CALIFORNIA APPELLATE COURTS RENDER BOTH ITS STANDARDS FOR DETENTION AND THE CONDUCT IT REQUIRES OF CITIZENS CONSTITUTIONAL.

California Penal Code[1] section 647(e) provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any

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1. Hereinafter "P.C."

> peace officer so to do if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands such identification.

This statute was enacted in 1961 and supplanted a roughly comparable portion

x

x

x

x

x

x

x

x

x

x

x

cf California's old P.C. section 647[2/]

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2. Old P.C. section 647 read:

"1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or,
2. Every beggar who solicits alms as a business; or
3. Every person who roams about from place to place without any lawful business; or,
4. Every person known to be a pickpocket, thief, burglar or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or,
5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,
6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or,
7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is

which survived essentially unscathed from

[Footnote 2 continued]

kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,

8. Every person who lives in and about houses of ill-fame; or,
9. Every person who acts as a runner or capper for attorneys in and about police courts or city prison; or,
10. Every common prostitute; or,
11. Every common drunkard; or,
12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any building or structure located therein and which is inhabited by human beings, without visible or lawful business with the owner of occupants thereof;

Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

its inception in 1872 until its replacement in 1961. This replacement was prompted in no small part by an article by Arthur H. Sherry, Professor of Law and Criminology, University of California, Berkeley, entitled "Vagrants, Rogues and Vagabonds--Old Concepts in Need of Revision", appearing in 1960 in Vol. 28 of the California Law Review at page 557, which was, as the title suggests, critical of the then extant California P.C. section 647 and other "vagracy" statutes of its ilk. Not coincidentally, Prof. Sherry was a principal author of the current P.C. section 647, including P.C. section 647(e). (See 48 C.L.R.[3] 557, 569-572.) Interestingly enough, Prof. Sherry's "proposed" P.C. section 647(e) does not go as far in protecting individual liberty as does the

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3. California Law Review.

section as enacted. (Cf., 48 C.L.R. 557, 570-571 and P.C. section 647(e).) Thus, the background of P.C. section 647(e) is that it is not an archaic vestige of a time when vagrancy and civil liberty took on a far different cast. It is the combined effort of a principal critic of this species of statute together with the California legislature to create a statute that accommodates both the civil liberties of the individual and the right of society as a whole to have its law enforcement officers engage in a reasonable crime prevention efforts.[4/]

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4. The fact that P.C. section 647(e) represents a conscious effort to address the problem faced by this court in the instant matter bears emphasis. It appears that, no matter how carefully a statute such as P.C. section 647(e) is drafted, there will be tension between the competing considerations addressed in such a statute. The right of the individual to be let alone is undeniable. So is the right of society's law enforcement personnel to take reasonable investigatory steps

Four cases in California have

[Footnote 4 continued]

in crime prevention. Any statute, such as P.C. section 647(e), designed to accommodate both interest, of necessity leaves the crucial decision of whether to intervene or not within the discretion of the police officer. Given the context in which the statute operates, "in the street", as it were, this is simply inevitable. It appears to be a wistful hope that any statute will more effectively delineate for police officers their duties and restrictions in this area than does P.C. section 647(e). This does not mean P.C. section 647(e) is unconstitutional; it merely means that we find ourselves in an area where hard and fast rules just do not work to anyone's complete satisfaction. It is a vice inherent in formulating general standards in an attempt to cover an infinite array of circumstances and people. It is not P.C. section 647(e) that is at fault, it is our limited powers of communication.

To bring this point home, one need only examine the Model Penal Code's attempt to address the area covered by P.C. section 647(e):

Model Penal Code, Proposed Official Draft § 250.6 of The American Law Institute (1962):

Section 250.6 Loitering or Prowling.

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for

served to interpret and, significantly limit,

[Footnote 4 continued]

> law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Without embarking on a lengthy analysis of the Model Penal Code's prowling statute, amicus curiae submits that it is no more effective in providing the peace officer with standards than is P.C. section 647(e).

P.C. section 647(e). These cases are, in

[Footnote 4 continued]

The factors listed are those which a peace officer with any experience would take into account, and in fact, permits a refusal to identify oneself to be considered without the limitation built into P.C. section 647(e). (See p. 17, supra.) A perusal of the Model Penal Code statute, as well as P.C. section 647(e) displays the insight of the following passage:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." (Boyce Motor Lines v. United States (1952) 342 U.S. 337.

chronological order, People v. Bruno (1962) 211 Cal.App.2d Supp. 855; People v. Weger (1967) 251 Cal.App.2d 584, cert. den. 389 U.S. 1047 (1968); People v. Caylor (1970) 6 Cal.App.3d 51, and People v. Solomon (1973) 33 Cal.App.3d 429; hearing den. 10-11-73; cert. den. 415 U.S. 951 (1974). When a state appellate court interprets a state statute, the words of the court's construction are placed in the statute as definitely as if it had been so amended by the legislature. (Winters v. New York (1948) 333 U.S. 507, 514.)

People v. Bruno delineated the elements of the offense: "(a) that the accused was loitering or wandering without apparent reason or business; (b) that, although requested by an officer, he refused to identify himself and account for his presence, and (c) that public safety considerations reasonably indicated a necessity

for the defendant's identification." (Id. at 859.) The case recognizes that statutes such as P.C. section 647(e) "represent an arena for conflict between healthy antipathy to the 'roust' or arrest on suspicion, on the one hand, and legitimate interests in crime prevention on the other." (Ibid.) The case also limits the application of the terms "wandering" and "loitering":

> "In daily parlance 'wandering' has a fairly innocent connotation. Here it appears in a criminal statute and is endowed with a somewhat more unpleasant color, indicative of one whose movements are coupled with criminal aims. It has been held that 'loitering' as used in a criminal statute has a sinister connotation, which includes waiting, but excludes the notion of waiting for a

lawful purpose. (In re Cregler, supra, 56 Cal.2d 308, 312.) Similarly here, if prohibited loitering consists of waiting for evil purposes, so prohibited wandering consists of movement for evil purposes." (Id. at 860-861.)

Further, in dealing with the third element of the offense that "'the surrounding circumstances [were] such as to indicate to a reasonable man that the public safety demands such identification'", the court observed that the propriety of the police inquiry turns on the knowledge of the officer and that the information he or she possesses at the time of the inquiry must meet the reasonable man standard. (Id. at 861-862.) What the court observed in closing is apt:

"Arguably the statute is an

antiloitering law which permits arrests on suspicion alone. Yet, it erects a built-in buffer against arbitrary police action. The ban against loitering and wandering cannot be isolated from the companion requirement of circumstances reasonably involving public safety. The statutory demand upon the private citizen for identification and explanation arises only in the context of the same circumstances. When the three parts of the statute are put together they present no patent constitutional objections and indeed seem to be consistent with doctrines stated in People v. Simon, supra, [5'] and similar

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5. People v. Simon (1955) 45 Cal.2d 645.

cases. Under the circumstances, we see no reason to disturb the judgment on constitutional grounds." (Id. at 863; fn. added.)

People v. Weger met the constitutional issues head on. That case's excellent discussion of both the application of P.C. section 647(e) and its constitutionality apply with full force to the instant matter. The Court of Appeal rejected the contention that P.C. section 647(e) is vague, uncertain and fails to establish clearly defined standards of guilt and thus denies due process of law. (Id. at 588.)

The court noted a principle, enunciated by the Supreme Court of the United States, which bears repeating here: "'[L]ack of precision is not itself offensive to the requirements of due process. " . . . [T]he Constitution does

not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." [Citations omitted.]'" (Id. at 588-589.) As we have previously noted (see footnote 4, supra) and as the court in Weger, as well as the United States Supreme Court recognized, the fact that one might arguably charge the authors of P.C. section 647(e) with a certain "lack of precision", in an area where lack of precision appears unavoidable, does not mean that P.C. section 647(e) is unconstitutional.

The court in Weger found the discretion conferred an appropriate limited discretion on peace officers, "analogous to the discretion vested in such officers to stop pedestrians or motorists on the streets for questioning under circumstances

short of probable cause to make an arrest." (Id. at 596.) The court pointed out that such discretion had been vested in peace officers and recognized in a long line of California authority, central to which is People v. Mickelson (1963) 59 Cal.2d 448. Following the Weger decision, this court recognized this principle as well in Terry v. Ohio, supra. The Weger court also made a distinction which should be borne in mind, and will be discussed more fully infra:

> "We are concerned here only with the constitutionality of the statute. We are not concerned with the reasonableness of the officer's action in arresting the defendant. Whether his action was reasonable necessarily depends upon the facts and circumstances of the case as developed at the time of trial. [Citations

omitted.]" (People v. Weger, supra, at 597-598.)

The California Court of Appeal again addressed P.C. section 647(e) in People v. Caylor, supra. The court cited People v. Bruno with approval and discussed the terms "loitering" and "wandering":

> "The word loitering as used in a criminal statute has a sinister or wrongful as well as a reasonable definite implication. As proscribed by such a statute it connotes lingering in the designated places for the purpose of committing a crime as opportunity may be discovered. It excludes the notion of waiting for a lawful purpose. (In re Cregler, 56 Cal.2d 308, 310-311 [14 Cal.Rptr. 289, 363 P.2d 305]; People v. Weger, 251 Cal.App.2d

584, 592 [59 Cal.Rptr. 661].) Similarly here, if prohibited loitering consists of waiting for evil purposes, so prohibited wandering consists of movement for evil purposes. (People v. Bruno, supra, 211 Cal.App.2d Supp. 855, 861.)" (People v. Caylor, supra, at 56.)

The court reiterated the principle to which the operation of P.C. section 647(e) was analogized in People v. Weger, supra, that "[a] police officer in the discharge of his duties may detain and question a person when the circumstances are such as would indicate to a reasonable man in a like position that such a course is necessary to the proper discharge of those duties. [Citation omitted.]" (People v. Caylor, supra, at 57.)

P.C. section 647(e) received most

thorough treatment in People v. Solomon, supra. The court which rendered the Weger opinion reexamined P.C. section 647(e) in light of intervening United States Supreme Court opinions, including Papachristou v. City of Jacksonville (1972) 405 U.S. 156, which, in essence, voided for vagueness "traditional" vagrancy statutes. (People v. Solomon, supra, at 432-435.) This is critical because the courts below relied on Papachristou in voiding P.C. section 647(e) contrary to the conclusion reached by the Solomon court.

In response to the argument that P.C. section 647(e) was void for vagueness, the Solomon court said:

> "The statute is asserted to be unconstitutionally vague. Yet under Terry v. Ohio (1968) supra, 392 U.S. 1, a peace officer is entitled to detair frisk, and

interrogate a person whose conduct raises a reasonable suspicion of criminal activity. The standard set out in Terry for the exercise of this authority is comparable to the one that brings section 647, subdivision (e) in play. Under Terry a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate (pp. 20-21). Under section 647, subdivision (e) a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between these two formulations. Each amounts to

> what Justice Harlan has termed "'articulable suspicion less than probable cause.'" (Terry v. Ohio, p. 31, concurring opinion.) Neither is subject to the infirmity of vagueness. Both justify the limited intrusion of temporary detention, followed in the one case by frisk and in the other by request for identification. (Parenthetically we observe that frisk involves greater intrusion into personality than does request for identification.)" (People v. Solomon, supra, at 435.)

In essence the Solomon court said that P.C. section 647(e) permits a detention in those situations where Terry v. Ohio would also.

Moreover, "[u]nder section 647, subdivision (e) the person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification must first be made." (Ibid.) The court also observed that the statute does not "lend itself to capricious enforcement for it only becomes operative when 'the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification'". (Ibid.)

In response to the argument that the power to detain and ask questions on less than probable cause to arrest does not mean that an officer can require that questions be answered, the court said,

> "It is within the bounds of legislative power to proscribe conduct that interferes with

> prevention and detention of crime, where the proscription is consistent with constitutional rights. (Cf. Pen. Code, § 148, obstruction or delay of a public officer in the discharge of official duty; Pen. Code, § 834a, resistance to arrest; Veh. Code, § 2800, failure to obey a traffic officer, Veh. Code, § 12951, subd. (b) and § 40302, refusal to present driver's license or other satisfactory evidence of identification on demand of a peace officer.) We find that the legislative power employed here to compel identification is consistent with constitutional right." (Id. at 436.)

The fact that P.C. section 647(e) proscribes conduct that interferes with the prevention and detection of crime bears emphasis. It is not only a legitimate but

an indispensable and crucial function of peace officers to ascertain the identity of people whom they have stopped in those situations where they have legitimately detained persons because of past, present or future criminal activity under the guidelines of Terry v. Ohio. When viewing what is required of a person under P.C. section 647(e) -- providing adequate identification -- we must never lose sight of the context in which it is required -- one of reasonable suspicion of criminal activity.

In 1977, the Rand Corporation, under the auspices of the National Institute of Law Enforcement and Criminal Justice, (Law Enforcement Assistance Administration, United States Department of Justice), produced a report, the findings of which demonstrate how crucial on the scene identification is to successful law enforcement. That report is entitled "The Criminal

Investigation Process: A Dialogue on Research Findings." ("C.I.P.") Significant is the following finding, regarding the efficacy of subsequent investigative work in identifying perpetrators:

> "Quite apart from the unreliability of arrest and clearance rates is the fact that they reflect activities of patrol officers and members of the public more than they reflect activities of investigators. Isaacs, Conklin and our own study showed that approximately 30 percent of all clearances are produced by pickup arrests by patrol officers who respond to the scene of the crime. In roughly another 50 percent of cleared crimes (less for homicide and auto theft), the perpetrator is known when the crime report is

first taken, and the main jobs for the investigators are to locate the perpetrator, taken him or her into custody, and assemble the facts needed to present charges in court. (See Table 1.)[6/] This means that around 20 percent of cleared crimes could possibly be attributed to investigative work, but we found that most of them were also solved by patrol officers, members of the public who spontaneously provide further information, or routine investigative practices that could also have been followed by clerical personnel." (C.I.P., Part IV, pp. 6-7.)

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6. This statistical table, incorporated in the quoted text demonstrates how crucial on-the-scene identification is to successful law enforcement:

[Footnote 6 continued]

Table 1
CLEARED CASES HAVING INITIAL IDENTIFICATION OF PERPETRATOR
(As a percent of all cleared cases)

Crime Type	Kansas City				Total Initial ID From Five Other Departments[b]
	Arrest at Scene	Complete ID by Victim or Witness	Uniquely Linking Evidence[a]	Total Initial ID	
Forgery/fraud	30.6	20.0	39.7	90.3	90.9
Auto theft	38.5	12.7	<7.8	>51.2[a]	47.4
Theft	48.4	8.6	17.2	74.2	70.0
Commercial burglary	24.4	16.9	16.9	58.2	80.0
Residential burglary	26.7	42.7	<6.2	>81.7[a]	80.0
Robbery	28.4	20.9	10.6	59.9	53.4
Felony morals	25.8	27.8	27.8	81.4	72.8
Aggravated assault	28.6	63.4	7.9	>94.1[a]	100.0
Homicide	28.3	34.8	10.9	74.0	42.9

NOTE: Numbers may not add to total because of rounding error.

[a] If no cases of uniquely linking evidence were found in the sample, or no cases other than initial identification, 95% confidence points are shown.

[b] Berkeley, Long Beach and Los Angeles, Ca.; Miami, Fla., Washington, D.C.

It can be seen that identification of perpetrators as early and as rapidly as possible is crucial to successful law enforcement. This was displayed concretely by the following example (among others) in the report: A 1974 study showed that in Oakland 85 percent of 413 assaults with a deadly weapon were cleared, but only two clearances were produced in cases with unnamed suspects more than eight hours after the crime was reported. (C.I.P, Part III, p. 4.)

P.C. section 647(e) plays a legitimate and vital role in California's attempt to deal with this reality. In those circumstances in which a peace officer can reasonably suspect that criminal activity was, is, or will be, a foot, it allows him or her to obtain the identity of a person so that, should it develop that the person

identified and released was involved in crime, he or she can be located. As the Rand Corporation report displays such identification is absolutely crucial in the successful solution of crimes. What this emphasizes is that P.C. section 647(e) has a legitimate and important purpose in the scheme of law enforcement. It is not a typical vagrancy statute nor is it simply a blanket license to pry and snoop. Rather it is a limited statute which requires of a person only that information which, as the Rand Corporation report shows, is a critical factor in the successful solution of crime.

In holding that P.C. section 647(e) also did not violate the privilege against self-incrimination, based primarily upon California v. Byers (1971) 402 U.S. 424, the Solomon court went on to further narrow the application of P.C. section 647(e) due to cases that emerged subsequent

to its decision in People v. Weger:

> "In view of these constitutional developments we now construe section 647, subdivision (e) on a narrower basis than we did in our former opinion. Because we believe the aim of the statute is to require identification when the surrounding circumstances involve the public safety, we construe the requirement of identification as primary and controlling, and we interpret the requirement account for his presence as wholly subordinate and adjunct to the requirement of identification, as operative only to the extent it assists in producing credible and reliable identification, for under current constitutional doctrine to require more might impinge upon the privilege against

self-incrimination."[7] (People v. Solomon, supra, at 437-438.)

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7. One can conjure up hundreds of hypotheticals where accounting for one's presence will help identify oneself. For instance, one might identify oneself as a relative of someone who lived in the neighborhood and whom one was going to visit. Such an explanation, while accounting for one's presence, also identifies oneself.

The court, in construing the "refusal to identify and account for presence" said,

> "We construe these requirements as essentially unitary, and hold that section 647, subdivision (e) is fully satisfied by the production of reliable identification. On this point we conclude with the observation that duty to identify comprehends a genuine identification, one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself. On this aspect of identification, accounting for presence may continue to play an ancillary role of importance." (Id. at 438.)

Thus,

> "Since we have construed duty to account for his presence as subordinate and adjunct to duty to furnish identification, questions involving the satisfactoriness of the

As first delineated in People v. Bruno, supra, at 859, and reiterated in People v. Solomon, supra, at 432, the essentials, or elements of P.C. section 647(e) are three in number: (1) loitering in the streets, (2) refusal to identify and account on request, (3) in circumstances involving the public safety. These three elements suggest two questions which are presented in assessing the constitutionality of P.C. section 647(e).

[Footnote 7 continued]

account given a peace officer by a suspected street loiterer and questions involving the standards of a peace officer must use in evaluating the account given to him do not arise. Once a person has furnished suitable identification he has satisfied the statute, and he may not be arrested or prosecuted for failure to account for his presence or failure to give a satisfactory or even plausible account to the interrogating peace officer." (Id. at 439.)

1) Do the circumstances in which a peace officer can detain a person under the power of P.C. section 647(e) pass constitutional muster?

2) Given an affirmative answer to question 1), has the state adequately and legitimately delineated a proper offense in P.C. section 647(e)?

Viewing the language of P.C. section 647(e), as well as the construction and limitations of application placed upon it by California appellate courts, as enumerated above, amicus curiae submits that both questions should be answered in the affirmative.

As to question one, the court in People v. Solomon, supra, made it clear that, given the limited meanings of the words "loiter" and "wander" for purposes of the statute, P.C. section 647(e) permitted detention of an individual under situations

comparable to that presented. (People v. Solomon, supra, at 435.) As we read Solomon, in those circumstances in which Terry permits a detention, so does P.C. section 647(e). In those circumstances in which Terry does not permit a detention, neither does P.C. section 647(e).[8/] As People v. Solomon points out, the statute itself only permits an intrusion when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (Id. at 435.) Given that the central focus is the public safety, and that P.C. section 647(e) comes into play only when action is necessary to protect the public safety, as to question one above, the section contains a "built in" constitutionality, as it

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8. Arguably in California the application of P.C. section 647(e) is further limited by In re Tony C. (1978) 21 Cal.3d 888 and People v. Bower (1979) 24 Cal.3d 638.

were. The essential differences between P.C. section 647(e) and Terry is not the standard for detention but the intrusion allowed. As Solomon points out, supra, at 435, the frisk allowed by Terry is a greater intrusion than the request for identification of P.C. section 647(e).

In response to the charge that the standards to initiate a detention are vague, it must be remembered that those standards are, according to Solomon, in essence the Terry standards. It almost goes without saying that the Terry standards are thought by this court to be sufficiently specific to be of constitutional guidance to peace officers. Given this fact, and remembering that absolute precision, particularly in the area of discretionary powers of investigation vested in a peace officer, is not only unattainable but also not required, the P.C. section 647(e) standards for detention are,

like those in Terry, constitutionally adequate. If such standards are to be of any use at all, they must necessarily be general in nature since they will be applied in virtually an infinite variety of situations. Whenever a general standard, such as in P.C. section 647(e), is applied to a specific set of facts, there is always a judgment, sometimes a difficult one, that must be made as to whether the specific set of facts fall within the general standard. This legal fact of life does not mean that a standard is unconstitutionally vague, it merely means that a standard must be of a general nature because: All the circumstances in which it will be applied simply cannot be anticipated when the standard is formulated and a standard's very nature, in the context of laws such as P.C. section 647(e), is to be comprehensive, since the alternative is to fashion laws approaching the infinite so

that each specific situation has a specific law. When the California Court of Appeal construed the standard for detention in P.C. section 647(e) to be essentially that expressed in Terry v. Ohio, it rendered that constitutional.[9/]

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9. It should also be noted that the Ninth Circuit ruled a Henderson, Nevada ordinance that is virtually identical to P.C. section 647(e) unconstitutional in Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), an opinion that was vacated when the United States Supreme Court took the case and ultimately rendered a decision, disposing of the case on other grounds. (Stone v. Powell (1976) 428 U.S. 465.) Putting aside for the moment the fact that as precedent the decision is not controlling in the instant matter, amicus curiae also submits that the opinion is not persuasive here for the following reasons: The opinion does not consider any of the limitations and constructions placed upon P.C. section 647(e) by California appellate courts, which is understandable given the fact that the court was construing a Nevada ordinance which happens to be the same as P.C. section 647(e). From this flow the following: When the court found fault with the standards for stop and detention (what the court identifies as elements (1) & (3) of the offense) (507 F.2d at 95-96), it did not have the benefit of People v. Solomon, supra, which equated the standards

Moving on to the second question, amicus curiae also submits that the state can

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[Footnote 9 continued]

in P.C. section 647(e) with those of Terry v. Ohio. A peace officer in California can only intervene under those situations permitted by Terry v. Ohio. Thus, the Powell court's condemnation of the Nevada ordinance as another vagrancy statute (see 507 F.2d 95) is inapposite. Also, to the extent that the court found fault with the requirement "to account for his presence", (ibid.), People v. Solomon made it clear that this was only an adjunct to identification and that the statute was fully satisfied by presentation of proper identification. (Id. at 438.) Moreover, the court in Powell identified the gravamen of the offense as vagrancy whereas the California cases make it clear that the gravamen of a violation of P.C. section 647(e) is the refusal to identify oneself. Finally, the court in Powell did not address the question of the propriety of making a refusal to provide identification in limited circumstances an offense. Due to the fact that this court did not have the opportunity in Powell v. Stone to address the language of P.C. section 647(e) in light of California appellate interpretations and limitations, amicus curiae submits that the now vacated opinion does not even deal with the precedent and reasoning crucial to the disposition of the instant matter. For that reason, the Powell opinion is of little aid in determining this case because we are addressing a

legitimately make it a crime to refuse to identify oneself in the circumstances described in P.C. section 647(e) and the cases which construe it. We begin with the premise that the person is in a situation where a reasonable person would recognize that the public safety demands such identification. As was pointed out in People v. Weger, the statute adequately indicates what a person must do to comply with its terms. (Id. at 593-594.) "Identity" is not a legal word of art but a concept of daily life. Further, as pointed out in People v. Solomon, all P.C. section 647(e) requires is that the person provide reliable identification. (Id. at 438.) A person "may not be arrested or prosecuted for failure to

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[Footnote 9 continued]

different statute by virtue of the narrowing and limiting constructions given P.C. section 647(e).

account for his presence or failure to give a satisfactory or even plausible account to the interrogating peace officer." (Id. at 439.) (Emphasis is original.)

With respect to the specific question of whether the state can legitimately require indentification in a penal statute, we can do not better than echo the words of Justice Fleming, concurring in People v. Weger,

> "I think it well within the scope of this duty to require a citizen to identify and account for his presence to public authority when he is abroad at 2:30 in the morning under circumstances where the public safety demands such

identification. In so doing the citizen makes a positive contribution to the tranquility of the neighborhood by releasing a peace officer for the performance of his duties elsewhere. * * * [I]n a society based on law the pure theory of individualism must defer to a reasonable accommodation between private privilege and public interest. When the public safety reasonably demands identification at 2:30 in the morning, the citizen has no constitutional right to remain anonymous." (People v. Weger, supra, at 604, 605.)

As was said in People v. Solomon, "[i]t is within the bounds of legislative power to proscribe conduct that interfers with prevention and detection of crime, where the proscription is consistent with constitutional rights." (Id. at 436.) The court recited a number of California statutes which serve as examples of proscriptions against interferences with prevention and detection of crime. For instance P.C. section 148 makes it a misdemeanor when one "willfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed. . . . " Certainly, a state can legitimately proscribe activity which resists, delays or obstructs its officers. Activity which violates P.C. section 647(e) also appears to violate P.C. section 148, insofar as the refusal to identify oneself delays or

obstructs an investigation in furtherance of public safety, but P.C. section 647(e) applies, being the more specific statute. When a lawful police investigation, wherein the public safety demands the identification of an individual, is a necessary predicate to a requirement that a person identify himself or herself, such a requirement infringes no constitutional right.

The power to require identification embodies a reasonable compromise between the competing considerations which create the tension that exists surrounding statutes such as P.C. section 647(e): public safety and crime prevention on the one hand and the right to be let alone on the other. P.C. section 647(e) will typically come into play where a crime or crimes, undiscovered by the peace officer as a demonstrable reality has occurred, is occurring or is about to occur. The

requirement of identification serves both competing considerations. On the one hand, it supplants the arrest on suspicion and thereby minimizes the government intrusion into a person's freedom. On the other hand, it serves at least two related crime prevention and investigative purposes: First, it deters crime by removing the cloak of anonymity customarily sought by lawbreakers, and, second, it provides a method whereby a peace officer can briefly detain an individual and learn the person's identity and, if it later develops that the individual is sought regarding an offense, there is a reasonable possibility of locating the person. In reality the individual interest at stake is <u>not</u> the right to be let alone, for the operation of the identification requirement of P.C. section 647(e) presupposes that the individual has been lawfully detained in an investigation

involving the public safety. Rather, the individual interest is the right to remain anonymous. Assuming arguendo that any such right exists as more than an ancillary benefit of the right to be let alone under normal circumstances, certainly the right falls away where identification is required in the interest of public safety. As Justice Fleming eloquently stated, P.C. section 647(e) represents a reasonable accommodation between the legitimate concerns of private privilege and public interest. (People v. Weger, supra, at 605, conc. op.)

In summary then, P.C. section 647(e) is a narrowly drawn statute. It allows a detention in those situations which the United States Supreme Court has endorsed the right to detain. Upon detention P.C. section 647(e) permits only a very limited intrusion, the providing of identification. As such, P.C. section 647(e) is a

reasonable exercise of legislative power. It imparts to the peace officer neither a blanket power to detain "vagrants" nor a blanket power to demand identification of anyone he or she finds suspicious. Further, compliance with the statute is easily discerned -- adequate identification is to be presented on request, akin to the presentation of an operator's license during a traffic stop. In closing,

> "[i]t bears repetition that we are not dealing with the typical vagrancy statute that makes status a crime but with one that makes conduct a crime. The statute contains three elements: (1) refusal to furnish identity (2) by one loitering on the streets (3) under circumstances that infringe upon the public safety. Proof of each element is essential in order to establish a

violation of the statute. In contrast, the ordinance in Papachristou v. City of Jacksonville, supra, 405 U.S. 156, created a crime whose sole element consisted of loitering on the streets, and the ordinance in Palmer v. City of Euclid, supra, 402 U.S. 544, while more comprehensive than the Jacksonville ordinance in that it contained the element of refusal to account as well as the element of loitering, was susceptible to arbitrary administration in that it lacked standards for its application. The California statute comes into operation only when surrounding circumstances suggest to a reasonable man some impairment of the public safety, and, as the court observed in

Terry, such circumstances can be objectively defined and articulated. In our view the presence in the statute of this third element furnishes sufficient protection against arbitrary enforcement to make the statute constitutional." (People v. Solomon, supra, at 438-439.)

Neither Michigan v. De Fillippo, supra, nor Brown v. Texas, 443 U.S. 47 (1979), two Supreme Court Court cases dealing with what are broadly categorized as "stop and identify" statutes, reach the question of the constitutionality of such statutes, and, in fact, in Brown the Supreme Court expressly noted that it was not deciding the question. (443 U.S. 52, n. 3.) In DeFillippo this court merely assumed the statute is unconstitutional (443 U.S. 36-37) and in Brown this Court specifically eschewed dealing with the constitutionality of the statute. (443 U.S. 52.)

The statutes in those cases require a person to identify him or herself, on pain of further detention

or arrest, any time a peace officer has lawfully detained them. P.C. section 647(e) is not such a statute. It is much more specific regarding the circumstances in which a detention may be effected pursuant to its provisions than either of the above statutes. Crucially, it also allows a peace officer to request identification of an individual only "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." It is this severe limitation on its applicability that renders P.C. section 647(e) a different species of statute than either the DeFillippo or Brown statutes. For this reason, P.C. section 647(e) comes under

neither the umbrella of DeFillippo, majority or dissenting opinion, nor of Brown. P.C. section 647(e) can be likened to the DeFillippo, Brown and Papachristou ordinances only by deleting crucial language from the statute and by disregarding the California appellate court decisions interpreting and limiting P.C. section 647(e).

Amicus curiae likens the identification requirement of P.C. section 647(e) to that endorsed in California v. Byers, supra, at 424, in which reasonable public safety legitimately requires such identification, rather than the blanket requirements of the statutes in DeFillippo and Brown. Significantly, Justice White joined the

majority in upholding California Vehicle Code section 20002 (a hit-and-run statute). Thus, Justice White's concurring opinion in Terry is not dispositive in evaluating P.C. section 647(e).

Turning to the dissent in DeFillippo, in which three justices joined, it poses similar problems of application to the instant matter. Of note is the fact that Justice White did not join in the DeFillippo dissent, which incidentally, quotes his concurring opinion in Terry. (Michigan v. DeFillippo, 443 U.S. 44.) As amicus curiae has urged earlier, the Detroit ordinance and P.C. section 647(e) are not comparable. But beyond that, Justice Brennan's characterization of the

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Detroit ordinance as patently unconstitutional bears mention in light of the fact that six justices upheld an arrest based on a good faith belief in the validity of the ordinance by a police officer. (443 U.S. 33-34, 37-38.) As the majority opinion observes, "[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." (443 U.S. 38.) Though one can argue the difference in degrees between patently unconstitutional and grossly and flagrantly unconstitutional, this indication from a

six-member majority of this Court that it did not consider the Detroit ordinance grossly and flagrantly unconstitutional is some indication that the majority did not share the dissent's view of the ordinance. As we have previously noted, P.C. section 647(e) is far more restricted in its application than the Detroit ordinance. Moreover, the dissent's criticism is directed at the feature of the Detroit ordinance which allows a peace officer to demand answers, on pain of arrest, any time an individual is stopped on suspicion. As previously delineated P.C. section 647(e) differs significantly from the Detroit ordinance in this regard. Thus, as with Justice

White's concurring opinion in Terry, the dissent in DeFillippo appears to be, at best, of limited application in assessing the constitutionality of P.C. section 647(e). In summary then, the California Legislature and appellate courts have taken pains to keep P.C. section 647(e) within strict constitutional guidelines.

CONCLUSION

It is perhaps unfortunate that P.C. section 647(e) was a descendant and shared the same section number, as what might be termed a more traditional "vagrancy" statute. It appears that some of the taint of that pejorative term has rubbed off on P.C. section 647(e). P.C. section 647(e) does

not deserve that taint. As amicus curiae has attempted to display, and as California appellate courts have noted, P.C. section 647(e) is not a vagrancy statute; it permits first, detention and second, a request for identification only in the most limited of circumstances

where the public safety requires such action. As such it is a constitutional exercise of the legislative power of the State of California to impart to its peace officers appropriately limited authority to investigate, in their undeniably legitimate endeavor to prevent crime.

Respectfully
submitted on behalf
of the Appellate
Committee of the
California District
Attorneys Association,

JOHN K. VAN DE KAMP
District Attorney of
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By

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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of John W. Messer, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 90014; that the District Attorney is the amicus curiae on behalf of the People of the State of California in the above-entitled matter. On April 22, 1982, I served three copies of the foregoing on the

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Executed on April 22, 1982 at Los Angeles, California.

VALERIA MASON

following persons by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in complaince with Supreme Court Rule 28, paragraph three, addressed as follows:

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DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, John W. Messer, Deputy District Attorney, is a member of the bar of this court. On April 22, 1982, under my supervision, Valeria Mason, an employee of the office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid, a box containing forty copies of the instant brief accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

The instant amicus curiae brief was thus mailed on April 22, 1982 which is within the permitted time.

JOHN W. MESSER

Amicus Brief

3

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CLERK

No. 81-1320

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1982

WILLIAM KOLENDER, et al.

Appellants,

v.

EDWARD LAWSON,

Appellee.

On Appeal From The United States
Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
and
BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE ON BEHALF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

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MOTION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Pursuant to Rule 36 of the Rules of the Supreme Court, the California Attorneys for Criminal Justice respectfully moves for leave of this Court to file the attached Amicus Curiae brief in support of the appellee.

INTEREST OF AMICUS CURIAE

California Attorneys for Criminal Justice is a statewide organization of attorneys, law professors, and law students in the State of California. Its purpose is to seek to issue the preservation of constitutional liberties and principles of fair play in the Criminal Justice System. An organization of over 2000 members, CACJ has filed many amicus briefs in cases involving issues of important in both

state and federal courts. Because of the constitutional significance of the issues in this case, CACJ asks leave of the Court to file this brief in support of the decisions of the District Court and the Court of Appeals in this litigation.

SUMMARY OF ARGUMENT

The language of § 647(e) of the California Penal Code insures discriminatory enforcement, arbitrary prosecution and the punishment of persons whose conduct is otherwise legal. In addition to violating the Fourth Amendment's ban on improper seizures and searches. § 647(e) violates the Fifth Amendment's protection against self-incrimination. The evidence in the record of this case reveals § 647(e) for what it is: an archaic justification for pretextual searches, interrogations and arrests of

persons whose appearance, conduct, or lifestyle is "unusual" or different from that of the majority of the population.

I.

ARGUMENT

THE LANGUAGE OF SECTION 647(e) INSURES DISCRIMINATORY ENFORCEMENT BY LAW ENFORCEMENT OFFICIALS, ARBITRARY PROSECUTION, AND THE PUNISHMENT OF PERSONS WHOSE CONDUCT IS OTHERWISE LEGAL.

California Penal Code § 647(e) provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor ... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do when the surrounding circumstances are such as to indicate to a resonable person that the public safety demands such identification.

Section 647(e) is the successor statute to an even older vagrancy law which prohibited inter alia solicitation of alms by beggars, roaming from place to place "without any lawful business"

wandering about the streets at late or unusual hours of the night, without any visible or lawful business and prowling or wandering upon the private property of another.

The essential elements of the offense of section 647(e) are: (1) loitering on the streets, (2) refusal to identify and to account on request, (3) in circumstances involving the public safety. People v. Solomon, 33 Cal. App. 429, 432 (1973).

The record in the instant case demonstrates in vivid detail the manner in which the § 647(e) was enforced in the case of Edward Lawson, a 36-year old black business consultant from San Francisco, California. Mr. Lawson had the misfortune, in addition to being a member of a racial minority, of wearing his hair in tightly braided Rastafarian style and enjoying traveling on foot or

hitchhiking in public places. It was his appearance and race that led to his being forcibly detained on 15 separate occasions during the period from March 1975 through January 1977. Mr. Lawson has never been detained or arrested or convicted of any other offense and he is a law-abiding, hard working citizen of the United States. He was however, prosecuted twice for violation of section 647(e), convicted once, forced to serve a jail sentence and placed on probation. On several occasions Mr. Lawson was held for a period of 24 to 48 hours in jail even though charges were dismissed.

This statute suffers from the classic evils condemned by this court in the case of Papachristou v. Jacksonville, 405 U.S. 156 (1972). The statute, as the Court of Appeals held, fails to give a person of ordinary

intelligence fair notice that his contemplated conduct is forbidden by the statute. Section 647(e) is unconstitutionally void for vagueness. This vagueness of the statute results in three separate evils. First, the statute itself does not give fair warning as to what the conduct is proscribed. What precisely constitutes "loitering" is very often subject to intense disagreement. In addition, it is submitted that the right to stand, walk or move in a public place, even if such standing and moving is without what the police officials perceive to be a lawful or business purpose, is constitutionally prctected conduct under the First Amendment. Second, the language of the statute which makes the failure to identify criminal "if the surrounding circumstances are such as to indicate to a reasonable man that the

public safety demands such identification" is unconstitutionally vague as well. In Colautti v. Franklin, 439 U.S. 379 (1979), this Court invalidated a statute whose wording is remarkably similar to certain wording involved in the instant case. In Colautti, the Court ruled on a constitutionality of a section of the Pennsylvania Abortion Control Act. That statute required that if a physician determines that a fetus "is viable" or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the opportunity for the fetus to be aborted alive. This Court held that the language "if there is sufficient reason

to believe that the fetus may be viable" was vague and unconstitutional. The language contained a "double ambiguity" in that it was unclear whether the statute imposed a purely subjective standard, or whether it imposed a mixed subjective and objective standard of liability. The language was ambiguous in that it was unclear whether "sufficient reason" meant that the judgment must be made from the perspective of the particular attending physician, or from the prospective of a cross-section of the medical community or panel of experts. 439 U.S. 379, 391. The Pennsylvania statute conditioned potential criminal liability on these confusing and ambiguous criteria. The instant statute uses nearly identical language and suffers from the same flaw.

In this case it is unclear in judging whether there is a violation of statute, the trier of fact must determine whether the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification, requires the trier to determine whether the policeman had an understanding of the surrounding circumstances to require such identification, or whether it is in fact the person accused who must have had such an understanding and then refuse to produce identification and an explanation for his presence, or whether it is the trier-of-fact ex post facto who must determine in the abstract whether a reasonable man in either the policeman's position, or in the defendant's position would have understood that the public safety required the production of

identification and explanation for person's presence.

The broad and vague wording of the statute, coupled with the apparent unlimited discretion invested in the policeman to determine on an ad hoc basis when the surrounding circumstances require the production of identification is such as to allow under the protective cover of the law's vagueness, the police officer to discriminatorily enforce the law against those persons of racial minorities or unusual appearance who for one reason or another have provoked the constabularies. As in the Papachristou case, those generally implicated by the "imprecise terms of the ordinance--poor people, non-conformists, dissenters, idlers--may be required to comport themselves according to a life-style deemed appropriate by the Jacksonville police and the courts." As in

Papachristou, where there were no standards governing the exercise of the discretion granted by the law, this statute permits and encourages arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at a whim of any police officer." Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965).

The third evil occasioned by the vague language of the statute is that it fails to give adequate guidance to any finder of fact who must decide guilt or innocence. Because the language fails adequately to give appropriate

standards, the range of decisions will depend upon the caprice of which jurors are selected in a particular case, or which judge is designated to try the offense. Whether the public safety is such as to require the display of identification would of necessity, given the ad hoc nature of the determination be subject to varying and widely differing interpretations. To make guilt of a criminal offense contingent upon these determinations ex post facto is unwise and unfair. Finally, because of the language of the statute, a person who is unjustifiably stopped and detained, and who does not wish to provide his identity or an explanation of his whereabouts or purpose to the police, is of necessity forced to guess whether the legitimate invocation of his right to remain silent is in violation of the statute, because a decision as to

reasonableness will only be determined ex post facto. This places such a person in an untenable and unfair position.

II.

SECTION 647(e) VIOLATES BOTH THE FOURTH AND FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

The requirement of 647(e) that the person seized by the police must identify himself and account for his presence is violative of the Fourth Amendment protection against illegal searches and seizures. First, the statute commits to the apparent unfettered discretion of the police officer the determination as to when a stop is permissible. This stopping and questioning is of course a seizure for purposes of the Fourth Amendment. Second, the required identification by the person has been construed to require that not only a person verbally identify themselves, but that under the constraint of the the statute they

produce some tangible form of identification such as a driver's license, passport or other document. See People v. Solomon, 33 Cal. App. 429, 438. This requirement of production of documentation under the statutory compulsion amounts to a search for purposes of the Fourth Amendment. In addition, as the facts in this case demonstrate, if the officer is not satified with the verbal answer of the person, in actual situations he will often then frisk the person's body and search through their pockets in a search for tangible identification. This occurred on at least one of the stops involved in the instant case. This statute both as written and as applied authorizes an arrest for conduct that is not more than suspicious. The legislature has attempted to reduce the standard from probable cause to mere suspicion. This cannot be done consistently with the requirements of

the Fourth Amendment to the Constitution.

This statute also violates the Fifth Amendment protection to be free from compelled self-incrimination. It should be noted that this statute unlike that statute in California v. Byers, 402 U.S. 424 (1971), does not require simply that the person identify themselves, but also that they "account" for their presence, which includes answering questions such as where the person has been and whatever other questions the officer may feel are appropriate to put to the person in an attempt to obtain an explanation for the presence. The statute requires under the penalty of criminal sanction that these questions, if they are relevant to the explanation of the person's presence and necessary for verifying the identification given, be answered. The questions in this case

typically involved not only a mere request for identification by the police but the demand for information concerning where Mr. Lawson had been, where he was going, what he was doing, and as well as what he was doing in the area at the time of the encounter:

> Q. . . . At that point, why didn't you release the subject?
>
> A. Because there still numerous questions that I had to ask that I did not know about the subject.
>
> Q. Exactly?
>
> A. For example, where he lived presently; where he was going; what he was doing in that area at that time of the night--three "for examples." [R.T. 142]

This statute is unconstitutional because it requires that the person, on pain of criminal punishment, provide answers to the police that are protected by the Fifth Amendment, on pain of conviction of a crime and sentence to

jail if he refuses. See Haines v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. SACB, 382 U.S. 70 (1965). Section 647(e) requires that the person questioned give answers to the question not only concerning his identity but "accounting" for his presence. Clearly the person has a valid Fifth Amendment right to refuse to answer questions concerning where he has been or where he might go, particularly if the interrogation takes place in the context of a criminal investigation. Yet under the terms of the statute the refusal to answer these questions if relevant to the officer's determination of the propriety of the identification, or the rationality of the account given by the person, are punishable by criminal sanction. A statute cannot

require what the Constitution forbids. Yet this is what section 647(e) purports to do.

III.

THE RECORD IN THIS CASE REVEALS THAT THE ACTUAL ENFORCEMENT OF SECTION 647(e) SHOWS IT TO BE A JUSTIFICATION FOR PRETEXTUAL SEARCHES, INTERROGATIONS AND THE ARREST OF PERSONS WHOSE APPEARANCE, CONDUCT, OR LIFE-STYLE IS UNUSUAL OR DIFFERENT FROM THAT OF THE MAJORITY OF THE POPULATION.

It is undisputed that Edward Lawson has never committed any crimes. Yet on 15 separate occasions his person was seized by the police, and he was interrogated on pain of incarceration if he refused to answer the questions the policeman believed to be relevant to an inquiry under § 647(e). Twice charges were filed and once a conviction together with a jail sentence resulted. In addition, on many occasions Mr. Lawson was sent to jail by the police and kept in jail for periods of several

hours until the charges were dismissed or the police made the determination that none would be filed. A reading of the transcript in the case makes one wonder whether these incidents occurred in the United States of America during the 1970's, or in some strange and foreign land in which absolute power is given to the police authorities to take whatever actions they deem appropriate. The record in this case shows that the police used § 647(e) as a way of stopping and imposing non-judicial punishment on persons whose appearance or demeanor they disliked, or who appeared to be other than "normal." The record also reflects that the police used 647(e) to punish persons who have not been "cooperative" with them in providing information on request.

The plaintiff described one of the encounters with the police in this case:

The witness:

> "I think he asked where I was going. And I indicated that I was going home. He then proceeded in the line of interrogation which he seemed to find rather amusing. I can remember one of his remarks was that this was going to make his evening. I assumed it had been a rather quiet night. There were a number of specific remarks that he made that made it very clear that he thought that all of this was very funny.

The Court:

> What were they? I am interested in the sequence of events, what you said and what he said.

The Witness:

> O.K.; I can remember him saying, "this is going to make my night" and I would here again tell you I am trying to recall something that took place three years ago. I can remember--here again, I don't know the substance of the jokes, but I can remember him and his partners having a few chuckles. I can remember them laughing ... [R.T. 9]

On one occasion after Mr. Lawson was arrested, he was released on bond pending his trial for violation of § 647(e). He went to a Community

College in the eastern part of Chula Vista to do research on his case. While on his way back from the Community College he was stopped again by one Officer Kinslow who approached him. After Mr. Lawson had the temerity to ask Kinslow what Kinslow was doing, Kinslow handcuffed Lawson, arrested him, and place him in the County Jail. [R.T. 23-27]

Mr. Lawson described yet another encounter which occurred under the protective aegis of § 647(e):

> ". . . He (the policeman) was sort of rambling along and then he dropped out of that and said something to the effect that, 'You are weird. Do you have any identification?' and then I asked what was the identification being pursued for and there was some

exchange there which was very-- and he just grabbed it out of my pocket, which I thought was extraordinary." [R.T. 99]

Equally remarkable in this record are the statements given by the defendant police officers during the course of their testimony. Despite the arguments of the appellants that the California Supreme Court's decision in Solomon substantially narrowed and restricted the otherwise unconstitutionally broad scope of § 647(e), the testimony of these police officers indicated their understanding of § 647(e) and their practice under it which allows them in effect question anyone they wanted for any reason they wanted and upon resistance by the person to charge him with a violation of a criminal law. One police officer testified on cross-examination:

Q. What was your legal authority?

A. My legal authority was 647(e) under certain circumstances, and you fell within those certain circumstances. I said that you were not committing a crime, to the best of my knowledge. I had not observed any activities that made me think you were going to commit a crime. However, I felt the safety of the citizens was at stake enough to talk to someone who was unusual in the area at that hour, walking in that area. It's a high crime area. That makes it legal for me to stop you and at least find out who you are even though you have not committed a crime and I don't think you may be about to commit a crime. . . . [R.T. 275-276] (Cf. Brown v. Texas, 443 U.S. 47 (1979)

Another officer in a separate incident testified as follows: "

"Q. (By Mr. Lawson) what if that time, the 15 seconds that you observed the defendant (sic) had the defendant (sic) done to led you to believe that the public safety warranted to him identifying himself?

A. Physically done?

Q. Physically, mentally, spiritually?

A. At that time and place, nothing.

Q. so you are saying, if I understand your answer to my

> question, that there was no piece of conduct that the subject himself did other than being at that time and that place that led you to believe that the public safety was in danger?
>
> A. At that time of the morning, it's more or less unsual to see somebody at that part of the intersection. Other than that, no. The business of that are open are across the street." [R.T. 230-231]

The tenor of the entire record is similar to these quoted portions of the transcript. The record in this case reveals that § 647(e) of the California Penal Code is used by the police to question those persons whose appearance they dislike, or whose attitude they feel is inappropriate. It also suggests that § 647(e) is selectively invoked as a sanction for refusal to answer those questions which the police officers want the person to answer. There is no showing in the record that section 647(e) is a valuable or useful tool of law enforcement, or that it in any way

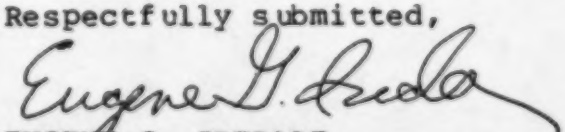
enhances the abilities of police officers to enforce the law. What it does suggest is that it is a convenient tool to mask harassment tactics and to selectively impose sanctions upon those persons who have the temerity to ask the policeman 'Why are you doing this to me?'

CONCLUSION

Edward Lawson, a United States citizen, was prosecuted and convicted for the crime of being a suspicious person who told the police that he did not want to answer questions. Other than that single blemish, his record of being a decent and law-abiding citizen is perfect. Any law that allows an American citizen to be convicted of the offense of being suspicious and of not giving a satisfactory account of himself is a law that is not only unconstitutional, but obnoxious to the basic liberties which we in our country

cherish. This is not Nazi Germany, nor occupied France where the carte d'identite is required to move freely on the streets. This is the country where one is free to walk and move about as he pleases and if he is obeying the law to answer or refuse to answer whatever questions may be directed to him by whatever police officials have chosen to accost him. A statute which allows someone who has committed no crime to be convicted for the offense of being deemed unusual by the police is a law which must be stricken down. The amicus respectfully requests that this Court affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM KOLENDER, et al.,

Appellants,

—v.—

EDWARD LAWSON

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLEE EDWARD LAWSON

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Interest of Amicus Curiae

The Center for Constitutional Rights is a non-profit legal and educational corporation dedicated to advancing and protecting the rights and privileges guaranteed by the United States Constitution. CCR believes that affirmance of the decision of the Ninth Circuit in the case at bar is necessary to ensure that the Fourth Amendment will continue to protect individuals seeking to enjoy their privacy and personal security without fear of unjustified intrusion by state police. This case is particularly important to CCR because the record below indicates that minorities and the unconventional bear a disproportionate burden of the exercise of police power at issue before this Court. Since its founding in 1966, CCR has litigated numerous cases in the federal courts where similar concerns have been present.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether a state can, consistent with the U.S. Constitution, pass legislation which authorizes police to stop, demand identification, and upon refusal to provide such identification, arrest individuals who the police consider to be "loitering" or "wandering" in circumstances where the police consider public safety to be endangered. Over a period of 21 months in the years 1975 to 1977 appellee, a Black male resident of the State of California and a citizen of the United States, was stopped innumerable times by California police primarily in situations where he was the only Black in areas populated by whites. He filed a Section 1983 suit against police officers citing 13 of

those stops, alleging that they were in clear violation of his rights under the United States Constitution. His claims that the stops were unconstitutional under federal law were upheld by the trial court and by the Court of Appeals for the Ninth Circuit. Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981).

In this brief, Amicus Center for Constitutional Rights will argue that the judgments of the District Court and the Court of Appeals should be affirmed. Amici will show that each of the stops tried before the district court were unlawful under the Fourth Amendment because state police did not have any "reasonable suspicion that [appellee] was involved in criminal conduct." Thus, under Brown v. Texas, 443 U.S. 47, 51-52 (1979) each stop was based on grounds less than those minimally required

under federal law. However, even if one assumes that the stops below were lawful under federal and state law, the state statute at issue must be declared invalid under the U.S. Constitution because of its vagueness, and its potential (as revealed in this case) for arbitrary enforcement particularly against minority groups.

I. CALIFORNIA PENAL CODE §647(E) IS UNCONSTITUTIONAL IN THAT IT AUTHORIZES THE POLICE TO STOP AND DETAIN INDIVIDUALS ABSENT A SHOWING THAT THERE WAS A REASONABLY ARTICULABLE SUSPICION THAT THE PERSON STOPPED WAS ABOUT TO COMMIT A CRIME.

In People v. Solomon, 33 Cal.App.3d 429, (1973) cert. denied, 415 U.S. 951, the California Court of Appeals upheld California Penal Code Section 647(e) (hereinafter 647(e)) against federal challenges.* The Court held that

* Section 647(e) provides: Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: ... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification. Cal. Penal Code §647(e) (Deering 1971).

the phrase "surrounding circumstances ... indicate to a reasonable man that public safety demands such identification" is comparable to the standard set forth in Terry v. Ohio, 392 U.S. 1 (1968) justifying a brief detention. 33 Cal. App.3d at 435.* Whether or not the State

* It is not clear that the California Court of Appeal is correct in analogizing the two standards. Terry indicated that a police officer is authorized to make brief stops upon observing "unusual conduct which leads him reasonably to conclude that criminal activity may be afoot. ..." Terry, 392 U.S. at 30. The "unusual conduct" which justifies a stop and request for information under 647(e) is nothing more that "loitering or wandering," conduct which this Court held was protected activity under the United States Constitution. See Papachristou v. City of Jacksonville, 384 U.S. 305 (1966). Below, the Ninth Circuit also questioned the Solomon Court's conclusion that 647(e) was in compliance with Terry. See Lawson v. Kolender, 658 F.2d at 1367 n.9. See also, Keenan "California Penal Code Section 647(e): A Constitutional Analysis of the Law of Vagrancy," 37 Hastings Law Journal 285, 294 (1980). Although this Court is bound to accept the Solomon

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of California agrees that California police can only stop suspects when the criteria stated in Terry are met, the facts of this case and the testimony of the defendant police officers indicates that state police in California have used 647(e) as a state-created license to stop, intimidate and harass people on no basis other than the police officer's passing whims and personal biases. As will be discussed in detail below,

(Footnote continued)

court's construction of 647(e) as the authoritative reading of the statute for purposes of review, it can hold that as construed, the statute authorizes stops that are in violation of the Fourth Amendment. See, Ker v. California, 374 U.S. 23, 33-34 (1963); Elkins v. United States, 364 U.S. 206, 223-24 (1960); Oregon v. Hass, 420 U.S. 714, 719 n.4 (1975).

appellee Lawson was stopped an innumerable number of times* in circumstances where he was guilty of no more than being the only Black in areas inhabited by whites. All of the stops were made in circumstances that are not justifiable under Federal Standards enumerated in Terry v. Ohio, 362 U.S. 1 (1968) and Brown v. Texas, 443 U.S. 47 (1979). The stops are thus unlawful since it is those decisions, and not Solomon which control this case.

---

* Although the civil rights suit which is the subject of this Court's review deals with "approximately fifteen occasions between March 1975 and January 1977 [when] Edward Lawson was stopped by law enforcement officials," (658 F.2d at 1363) appellee testified that "I do not have every police officer in San Diego County who has ever stopped me for identification. We simply have here those people who have exceeded the scope of what was appropriate... I have given identification to countless police." Tr. at p.38 L.16-23.

A. The Stops Of Appellee Were Unlawful In That There Was No Unusual Conduct Leading To Any Reasonable Suspicion That He Was About To Commit A Crime.

At the trial below, appellee, acting pro se, testified and was cross-examined about 12 incidents in which he was stopped by California police acting under the authority of 647(e). In addition, he cross-examined 12 officers who conducted the stops. The facts of each of the stops indicate that they were made by the officers without any observance of unusual conduct which could lead to a reasonable suspicion that appellee had committed or was in the process of committing a crime, as required under Terry and Brown. In each case, California police exercised arbitrary power in a manner specifically authorized under California law. How-

ever, each of the stops was unlawful under the Fourth Amendment.*

* The Court of Appeals did not engage in an analysis of the stops to ascertain whether they were in fact authorized by Terry or Brown v. Texas. The only indication provided by the Court as to the legality of the stops is the statement that the issue before it was "left open" in Brown v. Texas. See Lawson, 658 F.2d at 1366. The District Court apparently concluded that the stops were based on less than probable cause, but treated them as lawful because authorized by the California statute. Regardless of the lower court's determination of whether the stops were in compliance with federal standards, it is within the power of this Court to determine the matter to its own satisfaction. In Ker v. California, Justice Clark stated:

> "While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental - i.e. constitutional - criteria established by the Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investi-

(Footnote Cont'd Next Page)

1. One of first stops of appellee was by Officer Strickland on April 17, 1975 at approximately 10:30 p.m. Strickland testified that he had been briefed on a murder suspect but that the only description of the suspect that he received was the fact that he was a Black male. (Tr. at 154, L.22). He saw appellee in a business district where there was one business then open to the public. (Tr. at 157, L.14-16). There was also residential housing within 100 feet. (Tr. at 161, L. 20-21). When asked to explain "what distinguished the subject from all those other classes of people who you did not elect to stop?", Strickland responded as

(Footnote cont'd)

> gation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures..." 374 U.S. at 34 (1903).

See also, Beck v. State of Ohio, 379 U.S. 89, 92 (1964).

follows:

> "Apparently all the facts adding up to I had never seen him before. He was walking in an area uncommon for Blacks to be walking at that hour, in a closed business district, and in fact matched the description. ... (Tr. at 160, L,5-11).

After being stopped and questioned Lawson provided identification. (Tr.at 155, L. 20-24).

2. A second stop took place on May 27, 1976 in San Diego and was conducted by Officer Moulton. Moulton testified that he had been on the lookout for a burglary suspect who was identified as being a "tall, slender, Black male." (Tr. at 180, L.11). He stopped Lawson because he felt that Lawson matched the description of the suspect. (Tr. at 183, L.18). On cross examination the following colloquy took place:

Q. Was there anything in terms of what you observed the subject doing which led you to believe that the subject was a prowler or the prowler in question, or the hot prowler in question?

A. Let me see if I understand you correctly. Was he doing anything at that particular time?

Q. During any period of time that you observed him.

A. Just, other than the gesture of resolution when he saw me.

Q. The gesture of resolution. Could you explain that to me? I'm sorry; I don't undestand it.

A. Basically the look of someone who's caught with their hand in the cookie jar.

Q. Could you describe for the Court the standard that you are proposing, the "caught with your hand in the cookie jar look" basically is?

A. The shrugging of the shoulder, the mumbling to oneself.

Q. The shrugging of one's shoulders, the mumbling to oneself--you're indicating that led you to believe that this individual might in fact be the hot prowler in question?

A. It started me wondering, yes.

(Tr. at 186,187, L.9-24,1-4).

When asked whether he stopped each suspect who met the description, Moulton responded that he did not. (Tr. at 188, L.13). Before contacting Lawson, Moulton did not observe that Lawson was either "wandering" or "loitering." (Tr. at 191, L.10-14).

3. A third stop took place on April 25, 1975 in Chula Vista. Officer Villapando conducted the stop. He had been told by a citizen that a tall, long haired male negro was "loitering" in the area of a public school. About 9:30 in the morning, Officer Villapando saw Lawson "half a block" from the school. (Tr. at 196, L.11). Lawson was stopped, identification was demanded of him, and he was "released" when he provided identification. (Tr. at 197, L.23). The following exchange took place on cross-examination:

Q. Officer Villapando, for the period of time that you had specifically observed the subject, had the subject been wandering?

A. He was walking.

Q. Was that, in you opinion at the time, wandering?

A. He was walking southbound. He didn't appear to be wandering at the time.

Q. Was the subject loitering?

A. No, he just walked.

Q. Was the subject, during the period of time that you observed him, doing anything to imply that he was about to commit a crime?

A. During the time I observed him, no.

Q. That he was in fact in the process of committing a crime?

A. I didn't observe any activity, no.

Q. In terms of the subject during the period of time you specifically observed him, was there anything that he did that implied that he had been in the process of committing a crime?

A. I just observed him walking.

(Tr. at 187-200, L.10-25, 1-4)

Officer Villapando stated that the main reason he stopped respondent was because respondent was the only tall, male negro whom he had seen that day. (Tr. at 201, L.20). When asked whether identification was necessary to protect the public safety, the officer responded: "well, the citizen's report of the subject loitering in the area -- I never observed him in the area before and I felt if there were any future occurrence involving the subject, he should be identified." (Tr. at 202, L. 18-21).

4. Appellee was stopped by former Officer Champion on May 27, 1976. Champion testified that the main reason he stopped appellee was because he was seeking a suspect for a crime. He stated that "the only information the

police department had on it was that it was a Black male and no other description." (Tr. at 306, L.3-5). Under questioning, Champion further testified as followed:

> Q. Then you're saying that you had nothing to specifically connect the subject with the prowler in question, the black prowler that you had received a simple identification as being a black male?
>
> A. Between knowing and feeling you may be the person.
>
> Q. There was nothing--there was nothing that you saw or any knowledge that you had that specifically connected the individual that you contacted with the problems in question?
>
> A. The only thing that would show some correlation would be the backpack, and I never looked at the backpack....

(Tr. at 314,315, L.17-25,1).

When identification was demanded appellee complied, and was released.

5. Another stop took place at 10:30 p.m. on February 24, 1976. Officer Kinslow stated that he saw appellee

"dancing on the sidewalk." (Tr. at 244, L.22-23). It was because appellee's "dancing" that Kinslow "made a turn in the lot of the gas station and stopped, facing northwest to further observe Mr. Lawson." (Tr. at 245, L.2-4). As it turned out, appellee was hitchhiking and dancing intermittently. Upon cross-examination, Kinslow admitted that respondent was "hitchhiking in a legal manner." (Tr. at 255, L.16-17). Kinslow also admitted that he did not know of a law against dancing. (Tr. at 256, L.20-21). Nevertheless, Officer Kinslow stopped appellee under the authority of the statute. The record indicates unambiguously that the stop had no basis in law:

> Q. During the period of approximately three minutes that you observed the subject in question, can I then ask you: did the subject do anything specifically which would lead you to believe that he was anticipating the perpetration of any crime specifically?

A. In my opinion, after observing you before I contacted you, I had formed the conclusion that at the time you were capable of doing anything.

Q. At the time, during the three minutes that you observed the subject, did the subject do anything which would lead you to believe that the subject was preparing to commit a specific crime?

A. Again, you were not acting in what I considered a normal manner and you could have been preparing to do anything.

Q. Did the conduct of the subject during the three-minute observation raise in your mind the anticipation of a particular crime?

A. Raised in my mind an anticipation that a crime could occur, yes. That particular crime--you'd have to tell me which crime you're thinking about.

Q. Let me ask you, sir, which crime you were thinking about.

A. I thought if a pedestrian was to walk by, possibly just by your actions or what I observed, that you could have assaulted a pedestrian. I thought, by the way you were dancing around, that you were capable of moving into the street in front of a

> car, injuring youself or causing somebody else to be injured. There are numerous things that went through my mind.*

(Tr. at 257-258, L.8-25, 1-10).

There was uncontradicted testimony that the stop took place in a white area and appellee was the only Black person present. (Tr. at 25, L.7-8).

6. On January 24, 1977, appellee was stopped by Officer Zimmerman. Appellee described his reason for being in the area as follows:

> I had gone out to the University of California at San Diego campus to confer with a colleague of mine. I would say about this particular matter and I would say, in general, public transportation is nonexistent in this community, particularly after dark. The point also I would make is that it's a question of

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* An objection to this testimony was raised by police officers' counsel and sustained by the trial judge on the basis of Rule 403, Fed. Rules of Evidence. (Evidence may be excluded if prejudicial, confusing, cumulative or wasteful).

> being literally seen. On the occasions I have come to San Diego, and I'm driving and I'm simply not visibly present, that remarkably reduces this. It's a question of if one is black, one should be out of sight.

(Tr. at 48, L.9-27).

Appellee was walking in the area of the University at about 1:00 in the morning. Although Officer Zimmerman testified that it was not illegal for pedestrians to be on the road at that time (Tr. at 273, L.15), that appellee was neither "wandering" or "loitering" (Tr. at 272, L.22-23; Tr. at 273, L.6), and that appellee had done nothing to lead Zimmerman to believe that he was preparing to commit a crime, had committed a crime, or was committing a crime, (Tr. at 273-274, L.20-26), she stopped him. She explained the basis for the stop as follows:

> My legal authority was 647(e) under certain circumstances, and you fell within those certain circumstances.

> I said that you were not committing a crime, to the best of my knowledge. I had not observed any activity that made me think you were going to commit a crime. However, I felt the safety of the citizens in that area was at stake enough to talk to someone who was unusual in the area at that hour, walking in the area. It's a high crime area. That makes it legal for me to stop you and at least find out who you are even though you have not committed a crime, and I don't think you may be about to commit a crime. You may have committed a crime without my knowledge and without any indication on my part of even knowing whether you had or not at that time.

(Tr. at 275,276, L.23-25,1-10).

Appellee was stopped, and upon providing identification was released.

7. On March 22, 1976, appellee was stopped by Officer Sanchez. The stop took place in the "middle of the day" (Tr. at 32, L.7), in an area which includes a number of stores including a Seven-Eleven. In fact, "the building [appellee] was residing in was right there." (Id. at L.2-3). Officer Sanchez claims to have stopped appellee

because he was "walking on the paved portion of the roadway, approximately five or four feet from the shoulder of the road, which constituted a hazard to public safety and to his safety." (Tr. at 165, L.10-14). There was testimony that there were no sidewalks in the area, (Tr. at 32, L.5) and this fact was acknowledged by Officer Sanchez. (Tr. at 177, L.15). Sanchez also testified that the term "wandering" did not enter his head as the reason for the stop, nor did he think that Lawson was "loitering." (Tr. at 170, 171, L.21-2). Nevertheless, appellee was stopped and Sanchez demanded that he identify himself because of the "hazard to the public safety." (Tr. at 171, L.20). Upon providing identification, appellee was released.

8. On January 24, 1976, appellee was stopped by Officer Caplenor. Officer

Caplenor stated that he was working in an area where there had been a number of car burglaries that he assumed had taken place in the late evening or early morning hours. The officer saw respondent at approximately 4:00 a.m. (Tr. at 211, L.2). Caplenor had neither a name nor a description of any suspect. (Tr. at 232, L.18-23). Caplenor testified as follows:

> Q. Was there anything in the fifteen seconds in which you observed the subject that the subject did which would lead you to believe that the subject had just committed a crime?
>
> A. No.
>
> Q. Was there anything that the subject did during the fifteen seconds that you observed the subject which would lead you to believe that the subject was in the process of committing a crime?
>
> A. Other than being in the particular area that he was, and the time that he was there, no.

(Tr. at 229,230, L.17-25,1-5).

Appellee was stopped, identification was demanded of him, and upon refusal to

provide such information, he was arrested. Across the street from the place of arrest, there was a Seven-Eleven store as well as an all-night restaurant, both of which were open. (Tr. at 208, L.12-15). Upon first observing appellee, Caplenor stated that there was nothing unusual about appellee's appearance. (Tr. at 208, L.22-23). It was only after deciding to contact appellee and after having approached him that Caplenor notice that appellee's pants were torn and that he was "wet from the hips down." (Tr. at 208-209, L.25-2). The condition of appellee's clothes were claimed by the officer to be the basis for the stop although the record clearly indicates that the officer had decided to stop appellee before he noticed that condition.

9. On January 25, 1977, appellee was stopped by Officer Webb at approximately

3:00 p.m. The officer testified that he stopped appellee to find out why he was going from house to house with a yellow note pad. (Tr. at 288, L.8-11). Officer Webb stated that appellee needed a license to "go door to door for sales or interviews." (Tr. at 288, L.13-14)(emphasis added). This license must be displayed on the person and was not visibly present on appellee (Tr. at 288, L.16-20). On direct examination, Webb was asked why he thought appellee was soliciting. Webb responded: "Just the fact that he was talking to the lady, he cut across, carrying the yellow pad and pen, and then he went across the street and again started to enter into an apartment complex in here." (Tr. at 288-289, L.23-1). On cross examination he further testified as follows:

Q. Had you any specific or direct evidence that the subject in question was soliciting?

A. No.

Q. If you had no evidence that the subject was soliciting and you had discerned no evidence he was soliciting, how was it that you thought he was breaking the law.

A. I had legal cause to think he had broken a law.

Q. That cause being you had seen him writing on a legal pad and walking across the street; is that correct?

A. That's correct.

(Tr. at 300, L.8-17).

Upon demand, appellee provided identification, but he was still arrested, notwithstand the fact that a third year law student who witnessed the event approached Officer Webb and explained Lawson's actions.

10. On April 16, 1976, appellee was stopped by Officer Atkins at 11:30 p.m. because he "understood" appellee to be unlawfully standing on the freeway

(Tr. at 32, L.6-8). The exact location of the stop was a noted intersection, (Tr. at 330, L.9) and contained a traffic light which may or may not have been red at the time of the stop.* Officer Atkins testified that he did not think the appellee was "wandering," (Tr. at 334, L.18) but, he did think that appellee was "loitering" since appellee had "lingered idly in a position or spot" for a period of approximately 10 seconds. (Tr. at 335, L.10-19).

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* The record is unclear on this point. The officer testified that he could not tell "whether it (the light) was red, green, or yellow." (Tr. at 336,L.15-16). However, appellee did not state affirmatively that the light was green possibly because acting pro se, he could not have done so without engaging in argument with the witness.

Upon demand for identification, appellee refused. Officer Atkins physically removed a United States passport from appellee, and then arrested him.

11. The stop of appellee by Officer Swaim took place on March 17, 1975 between 5:30 and 6:00 p.m. It was a Saturday afternoon and the officer admitted that restaurants are generally crowded on weekend afternoons. (Tr. at 352, L.3-20). According to appellee he was at a vegetarian restaurant meeting with a business associate.

> "...[T]he restaurant was peopled by countless people. There were two Black people in the restaurant; myself and Mr. Redding. There was nothing about our presence in that restaurant that in any way, shape or form distinguished us from anyone else there save the fact that we were Black."* (Tr. at 15, L.14-19).

* Officer Swain testied that appellee and his friend were the only people in the restaurant. See Tr. at 345,L.10.

At the time that respondent and his friend were in the restaurant, Officer Swain was looking for a felony suspect who was described as being a "white male that had one leg." (Tr. at 344, L.11). Because Swain had been on the force for only 1 week and did not know anybody in the area, he felt he would "contact some people and determine if anybody had ever seen anyone like that or if anybody knew --if they knew the gentleman, where he lived." (Tr. at 344-345, L.22-24,1-3).

Q. What did you do then?

A. I got out of my car. There was a restaurant on the corner there and I got out of my car and walked up to the door of the restaurant. The door was open and I looked inside the restaurant and there were two gentlemen standing there.

Q. Do you know who they were?

A. At that time, no, I didn't.

Q. Do you know now?

A. Yes

Q. Who were they?

A. One of them was Mr. Lawson and the other gentleman was--his last name was Reedy, I believe.

Q. Was anyone else--were any other customers in the store at the time?

A. No, there were no other customers in the store.

Q. What did you do?

A. I stood in the door and looked over. They were more or less to my right, standing at the counter, and I said, "would you step outside; I'd like to talk to you."

Q. What was your purpose in asking them to step outside to talk with you?

A. I really don't know. I just wanted to talk to them and ask them to step outside.

Q. Were you going to ask them questions about the felony suspect?

A. Yes, I was.

Q. Was that your intention in asking them to come outside?

A. Yes.

Q. What was their response?

A. They said, "Okay," and walked outside.

Q. You mentioned there was a counter. Is that a counter where you would go up and order something?

A. Yes.

Q. And what happened when you got outside?

A. I walked out to the sidewalk first and they followed me out to the sidewalk and I turned around and the first thing I asked was for some identification.

Appellee provided identification, and was released.

12. The stop of respondent by Sheriff Larson took place on March 8, 1975 in Chula Vista. Appellee was stopped when walking on the left hand side of the street where a sidewalk would be if one existed.* (Tr. at 7, L.3-7) Larson

* Sheriff Larson testified that appellee was "walking down the middle of the road obstructing traffic." (Tr. at 120, L.9-10).

testified that he knew nothing about appellee and had no reason to believe that appellee was involved in crime. (Tr. at 136-137). Larson did testify that walking down the middle of the street when there is traffic is a crime, (Tr. at 137) but did not issue a citation for that "offense" because he felt that 647(e) "was more appropriate." When asked the meaning of 647(e), the officer testified as follows: "Essentially any person wandering about with no apparent reason, no apparent cause ... is required by 647 (e) to identify himself to a peace officer and also to explain his reasons why he is there." (Tr. at 138, L.5-8). According to officer Larson, the "first thing" he did when he made contact with the individual was to ask for appellee's identification. "I asked him specifically who he was, where he was coming from, and

specifically where he he lived, and where he was going." (Tr. at 119, L.21-23). Appellee refused to answer these questions, was arrested, and went to jail.

Amici submits that in each of the above instances,* appellee was stopped in violation of federal constitutional standards. There is not a single stop

* These were not the only stops which appellee challenged in his lawsuit. He provided direct testimony at trial about a stop which took place on Feb. 16, 1976 in which appellee was set upon by "a whole onslaught of county sheriffs" (Tr. at 27-30); and a stop on April 1, 1976 in which he was stopped by an Officer Rubin, arrested for failure to identify himself, jailed, tried, and convicted by a jury. (Tr. at 33-38) Since the police officers involved in those detentions were neither present, nor provided testimony at the trial of the civil rights case which took place on March 21, 1979, Amicus has not discussed those incidents.

described in the record below, where police officers saw appellee engaged in any "unusual" conduct which would justify a stop under the standard elaborated upon by this Court in Terry v. Ohio, nor did the officers have any "reasonable suspicion that appellee was involved in criminal conduct" as is required by Brown v. Texas. Yet in each case, officers testified that they were authorized to conduct the stops because of 647(e).

Whatever the status of these stops under state law, they are clearly violative of established Fourth Amendment principles, particularly those enunciated by this Court in Terry v. Ohio, 392 U.S. 1 (1968) and Brown v. Texas, 443 U.S. 47 (1979). Moreover, the stops are particularly analogous to the wanton police misconduct which was condemned by this Court in Davis v. Mississippi, 394 U.S. 721 (1969). In that case, this

Court reversed the conviction of a Black male who had been convicted of rape in the state courts. Mississippi police, armed only with the fact that the rape was committed by a "Negro youth," proceeded to roam the streets of Meridian, Mississippi stopping and detaining at least 24 Blacks who were "questioned briefly, fingerprinted, and then released without charge. The police also interrogated 40 to 50 other Negro youths either at police headquarters, at schools, or on the street." 394 U.S. at 722. The State admitted that the arrests were not based upon probable cause. This Court held that the fingerprint evidence used to convict Davis was illegally obtained by the police in violation of the Fourth Amendment. 394 U.S. at 725. In overturning the conviction this Court pointed out:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purpose of the Fourth Amendment. Investigatory seizure would subject unlimited numbers of innocent persons to harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." 394 U.S. at 726-727.

It is in this context that one can gauge the absurdity of the State's contention that the Fourth Amendment is not involved in this case since appellee may not have been "seized." (Appellant's Brief on the Merits at p.15). In each and every stop herein there can be no question that appellee "perceiv[ed that] his liberty ha[d] been constrained by physical restraint, threat of force, or assertion of authority.*" First of all, the state

* The quote in the text is a paraphrase of the test stated by the Appellants at p.15 of their Brief on the Merits.

has made clear that the 647(e) authorizes arrest upon failure to provide identification when demanded. (Appellants Brief on the Merits at p.17). In addition, however, the record reflects that during the first stop of appellee on March 8, 1975, he was told by police officer Larson, in no uncertain terms, that if he failed to provide identification, he would be subject to arrest. (Tr. at 125, L.12-13). Since as a matter of chronology, this was the first stop of appellee, it stands to reason that at each subsequent stop he was aware that he was not free to simply walk away upon being stopped by a state officer.

However, an even stronger reason for concluding that appellee was aware of the fact that he had no freedom to leave upon a police request for identification, is

that he was jailed* for refusing to provide identification. Thus, there can be no doubt that at each one of the stops, appellee perceived himself under restraint.

Once the nature of the coercive compulsion contained in 647(e) is understood, the emptiness of the state's claim

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* Since respondent was arrested and jailed for violation of 647(e) there is no need to balance whatever public interest justifies 647(e) and appellee's right to personal security free from arbitrary interference by law enforcement officers. Such a balancing test only applies to "seizures that are less intrusive than a traditional arrest." See, Brown v. Texas, 443 U.S. 47, 50 (1979). Additionally, such a balancing process can only be justified if the arresting officers had some reasonable basis for believing that appellee had committed some crime, or was about to commit some crime. Since none of the arresting officers were able to provide any such basis for the stops of appellee and testified as such, there is no "public interest" to balance in this case. Under the facts of this case, there are no public interests which are served by 647(e).

of the limited intrusion mandated by 647 (e) becomes apparent. The state has claimed that the stops which took place below do not violate federal standards because a request for identification is less intrusive than a patdown search, and since Terry was decided in the context of a search, the identification request on the part of the state should not be deemed to be a significant intrusion on Fourth Amendment interests. (Brief of Appellants at p.25-31). Such an argument demonstrates little comprehension of the nature of the interests protected by the Fourth Amendment. As the Court stated in Terry and Davis, the interest which the Amendment protects, is the prevention of unjustified "whole-sale intrusions upon the personal security of our citizenry." Davis v. Mississippi, 394 U.S. 721, 726. And as Terry v. Ohio made clear, the Court has rejected "the notion that the Fourth Amendment does not

come into play at all as a limitation upon police conduct if the officers stop short of something call a 'technical arrest' or a 'full-blown search.'" Terry v. Ohio, 392 U.S. 1, 19 (1968); Davis v. Mississippi, 394 U.S. 721, 726.

The contention of the state flies in the face of these fundamental notions. Appellee's Fourth Amendment rights were violated the moment he was stopped without reason by police officers, forced to remain in their presence and required to respond to their inquiries under pain of arrest and imprisonment. The state focuses on the events after the initial contact, completely missing the thrust of this Court's past pronouncements that Fourth Amendment interests are implicated at the moment of the unjustified stop. When appellee and his friend were singled out in a restaurant, interrupted in their meal and required to step out-

side and talk to a police officer about the whereabouts of a "one-legged white man" (Tr. at 343-357), appellee's rights were violated. For it is at the moment of the unjustified contact, and no later, that he is subject to the "harassment and ignominy incident to involuntary detention." Davis v. Mississippi, 394 U.S. at 721,727. What happened after the detention, whether a patdown or an arrest, is merely cumulative harm, compounding the original injustice. The record thus clearly indicates that there can be no doubt that appellee was detained in violation of federal standards in each of the instances tried below. He was not free to walk away, and the intrusion on his person was not lessened by the fact that he was not arrested or searched in every instance.

B. Since The Fourth Amendment Violations Which Took Place Below Were Authorized By California Penal Code 647(e), The Judgment Of The Court Of Appeals And The District Court Holding 647(e) Unconstitutional Should Be Upheld.

In each of the stops tried before the court below, the officers testified that the arrests were based on 647(e) and that there was a belief on their part that the public safety was endangered by appellee. The trial judge concluded that, in making the arrests, the officers were exercising good faith reliance on a state statute that they assumed was valid. Lawson v. Kolender, 659 F.2d 1362,1364 (9th Cir. 1981). Assuming that the stops were in conformity with state law,* this

* Amici wish to point out that a strong argument can be made that the stops were not even lawful under California law. In People v. Bruno, 27 Cal. Rept. 462 (1962) the dispositive terms of 647(e), "loiter" and "wander" were defined as "waiting or movement for evil purposes," and/or "lingering for the purpose of committing a crime as opportunity may be

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case comes within the purview of the numerous cases in which this Court has established that state statutes which authorize or encourage conduct that is in violation of federal constitutional requirements must be stricken as unconstitutional. See Reitman v. Mulkey, 387 U.S. 369 (1967)(declaring unconstitutional Sec. 26 Art.I of the California Constitution on the grounds that it "authorized" racial discrimination in the housing market.). See also McCabe v.

(Footnote cont'd)

discovered." 27 Cal.Rept. at 458. The extensive trial testimony quoted supra indicates that possibly even this standard was not met in the stops of appellee. On April 1, 1976, respondent was stopped, and upon refusing to provide identification was tried and convicted in the California state courts. The record indicates that the conviction was appealed and affirmed by the California courts. Below, appellee informed the trial judge that the case was still "rising through the court system" through habeas corpus. (Tr. at 39). Thus, the state courts may have the opportunity to address the lawfulness of at least one of the stops under state law.

Atchison, Topeka and Santa Fe Railroad Co., 253 U.S. 151 (1914); Nixon v. Condon, 286 U.S. 73 (1932); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Peterson v. City of Greenville, 373 U.S. 244 (1963); Robinson v. State of Florida, 378 U.S. 153 (1964); Lombard v. State of Louisiana, 373 U.S. 267, (1963); see also Mapp v. Ohio, 367 U.S. 643, 678-679 (1961) (Harlan, J. dissenting); Wolf v. Colorado, 338 U.S. 25 (1949). These cases* all make clear that official state policies which deprive citizens of rights protected by the federal constitution must be stricken,

* The applicability of the cases cited in the text to the issue before the Court is not lessened because those cases were decided on Fourteenth Amendment grounds. Wolf v. Colorado, 33 U.S. 25 (1949) specifically held that "the security of one's privacy against arbitrary intrusion by the police --- which is at the core of the Fourth Amendment --- is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the states through the due process clause."

(Footnote Cont'd next page)

and thus provide an additional ground*

for supporting the judgment of the Court

of Appeals.

(Footnote cont'd)

388 U.S. at 27-28. Moreover it has been argued that "Fourteenth Amendment methodology provides a particularly apt analogue for determining parallel questions in Fourth Amendment analysis because both amendments protect closely analogous personal rights.... Just as the Fourteenth Amendment protects the personal right of privacy and liberty, the Fourth Amendment protects the personal right of privacy. The two amendments have ... much the same structure. Neither purports to establish rights; both purport to establish minimum procedures by which rights may be invaded." Walinski & Tucker, "Expectations of Privacy: Fourth Amendment Legitimacy Through State Law, 16 Harvard Civil Rights - Civil Liberties Law Review 1, 8 (1981)

* The Ninth Circuit concluded that 647(e) was violative of the Fourth Amendment because it "bootstrap(s) the authority to arrest on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest." See Lawson v. Kolender, 658 F.2d 1362, 1366-1367, and cases cited therein.

II. 647 (E) IS UNCONSTITUTIONALLY VAGUE IN THAT IT INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT AND DOES NOT PROVIDE ADEQUATE NOTICE OF CRIMINAL CONDUCT.

This Court has repeatedly emphasized that a statute which is so vague as to invite discriminatory and arbitrary enforcement violates due process. Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Herndon v. Lowry, 301 U.S. 242, 259 (1937); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Cox v. Louisiana, 379 U.S. 536, 559 (1965). The necessity for clear statutory standards is particularly grave with vagrancy and loitering laws such as 647(e) because of the vague and speculative nature of the crime. Such statutes, which outlaw otherwise lawful behavior with the common justification of preventing "future criminality," Papachristou v. Jacksonville, 405 U.S.

165, 170 (1972), were considered by the late Justice Frankfurter to be "in a class by themselves in view of the familiar abuse to which they are put." Winter v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J. dissenting).

In the leading case of Papachristou v. City of Jacksonville, 405 U.S. 165 (1972) this Court stressed that the victims of such abuses are most often poor and/or non-white - "the poor among us, the minorities, the average householder are not in the business and not alerted to the regulatory schemes of vagrancy laws, "id at 163-4 and consequently are particularly vulnerable to the misuse of such laws. The Papachristou court futher expressed concern that the statute contained the potential that "poor people, non-conformists ... may be required to comport themselves according to the lifestyle

deemed appropriate to the Jacksonville police." 405 U.S. at 170.

Under California law, before 647(e) can be applied to an individual's behavior, the person must be "loiter(ing)" or "wander(ing)." California courts have defined these terms as "waiting or movement" "for evil purposes," and/or as "lingering ... for the purpose of committing a crime as opportunity may be discovered." People v. Bruno, 27 Cal. Rept. 462 (1962). Under either of these constructions, the statute lacks the specificity necessary to provide guidelines for its application in a non-discriminatory manner. Both allow "that a person may stand on a public sidewalk ... only at the whim of any police officer," Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965) and fail to provide any notice to the wrongdoer of the conduct which has been proscribed. What appears to one police

officer as loitering with an evil purpose will appear wholly innocent to another, and this will often depend on impermissible variables such as the race of the wanderer.* Alternatively, if "loitering" and "wandering" connote lingering or walking "for the purpose of committing a crime as the opportunity may be discovered," the statute has been applied beyond its proper scope, for many of the officers who stopped appellee did not believe he was linked with crime.

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* The record is filled with police stops "at the whim of the police officer." Appellee testified as follows about one of the stops: "I had been walking for a distance in this direction [and] had gone past a police car about 10 minutes earlier...[That] police officer saw me and drove right past me. Whatever Caplenor saw, that cop saw also...Whatever he's [Caplenor] going to allege was a motivation for stopping us, that policeman saw and did not deem it as such." (Tr. at 20-21, L.23-7).

Even if police attempt to apply 647(e) only to "loitering" or "wandering" that appears to them to be for an unlawful purpose, the statute lacks standards for determining the type of behavior which would reasonably indicate an unlawful purpose. Although in some instances, such behavior is readily discernable to a trained observer, Terry v. Ohio, 392 U.S. 1, 23 (1968), in many cases it is not. The statute, lacking such standards, leads to "government by the moment to moment opinions of a policeman on his beat," Cox v. Louisiana, 379 U.S. 536, 559 (1965)(separate opinion of Justice Black), opinions which are inevitably subject to his prejudices and fears. Demonstrating this, out of the 12 stops of appellee in a 21-month period, he was convicted but once, and only of the 'crime' of failing to identify himself. No links with any other type of criminal activity were

discovered through the repeated interrogations.

The repeated use of 647(e) to harass law-abiding members of the minority community has been a major problem in San Diego police-community relations at least since 1966. A major research study submitted to the President's Commission on Law Enforcement and the Administration of Justice, dated October, 1966, noted that "the field interrogation [under 647(e)] in San Diego probably contributes negatively to police-public relationships more than any other single policing technique..." (at 142)..." "In almost every interview with Negroes (and Mexican-Americans) in San Diego, the ill-feeling produced by the field interrogations program was

prominently mentioned."* (At 128).

The Supreme Court in Terry v. Ohio, 392 U.S. 1, 14 (1968), explicitly mentioned this concern - noting that stopping individuals on less than probable cause and subjecting them to limited weapons searches "cannot help but be a severely exacerbating factor in police-community tensions." (Terry, 392 U.S. at 14 n.11). Repeated unjustified requests for identification on less than probable cause, as 647(e) permits, have the same severely harmful effect on police-minority relations. Such police behavior, as

*Lohman & Misner, The Police and the Community: The Dynamics of Their Relationship In A Changing Society. Vol. I. Report of a Research Study submitted to the President's Commission on Law Enforcement and the Administration of Justice. (Berkeley, 1966)

experienced by appellee who was hardly able to go near San Diego without being questioned, is part of what the Terry court called "the wholesale harassment by certain elements of the police community, of which minority groups, particularly negroes, frequently complain," 392 U.S. at 14.

For a statute such as 647(e) to adequately serve its alleged purpose without exacerbating problems in police community relations, it must contain guidelines that prevent discriminatory enforcement. 647(e) not only fails to do this, but encourages such disciminatory enforcement. It is thus unconstitutionally vague.

In fact, the language of 647(e) is substantially identical to that of the Jacksonville ordinance that was stricken

down in Papachristou.* The Supreme Court held that such language is constitutionally inadequate because it places excessive discretion in the hands of the police, reaches innocent behavior and because of the "lack of notice given a potential offender," 405 U.S. 166 at 168.

The language in C.P.C. 647(e) is subject to the same infirmities - individuals have no discernable means of knowing what behavior will reasonably appear to a police officer to be without "reason" or "business."

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* 647(e) applies to those who loiter or wander "upon the streets without apparent reason or business." Jacksonville ordinance §26-57 declared unconstitutional in Papachristou stated that "persons wandering or strolling around from place to place without any lawful purpose or object ... shall be deemed vagrants."

647(e) further provides that wanderers or loiterers must identify themselves "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification" (Deering 1971). This provision fails to give individuals a clue as to what circumstances or behavior give rise to a reasonable man's* belief that the public safety demands identification. It is thus unconstitutionally vague.

An identically worded standard of public safety was found impermissibly vague in Powell v. Stone, because it was "far too amorphous a standard to provide ... reasonable notice to the possible

* The "reasonable man" in the statute refers to the enforcing police officer, People v. Solomon, 33 Cal. App. 3d 429, 435, 108 Cal. Rptr. 867, 871 (1973); People v. Bruno, 211 Cal.App. 2d 855, 862, 27 Cal. Rptr. 458, 462 (1962), so the circumstances relevant in making the determination are those within the officer's knowledge.

offender (who, indeed, may not be aware of the circumstances that implicate the public safety)" 507 F.2d 93 (1st Cir. 1974), rev'd on other grounds, 428 U.S. 465, 96 S.Ct. 3037 (1976), see also People v. DeFillippo, 80 Mich. App. 197, 262 N.W. 2d 921 (1977), rev'd on other grounds, 443 U.S. 31 (1979), U.S. ex rel Newsome v. Malcolm, 492 F.2d 116, 1173 (2d Cir. 1974), aff'd sub. nom. Lefkowitz v. Newsome, 420 U.S. 283 (1975). The innocent citizen from whom identification is demanded has the problematic choice of complying with the demand or facing arrest, without any means to determine whether the police officer's demand is justifiable.

The Court in People v. Solomon, 33 Cal. App. 2d, 429, 108 Cal. Rptr. 867 (1973) held that the standard of public safety protection necessary to justify the identification demand on less than

probable cause in 647(e) was substantially identical to the Terry v. Ohio requirement that the police office have a "reasonable belief that official intrusion is appropriate," to justify the patdown search,* and that the requirement of identification was less onerous and less intrusive than a patdown search. However, the standard used to justify identification demands in 647(e) is actually much less exacting than that used in Terry.

None of the police officers in the case at bar made observations and analysis

* Yet, Terry's primary justification for the stop-and-frisk exception to the probable cause requirement was, that it was needed to protect the officer's safety. 392 U.S. at 29. No such pressing justification is offered for the invasion of personal security on less than probable cause provided for by 647(e). None of the 12 officers who interrogated appellee testified that he or she felt that appellee was armed and dangerous.

in any way equivalent to the observations made by Officer McFadden before he made his patdown search in Terry. The state's argument that the statute satisfies due process requirements because the request for identification provides notice as to what behavior is prohibited, (Appellant's Brief on the Merits at p.20-21), begs the question -- their argument does not address the circumstances that justifiably activate the request for identification. The circumstances are not spelled out in the statute nor in state court interpretations, and thus, are unlikely to be within the knowledge of the person on the street. As stated by the Court of Appeals below: "An innocent person cannot generally know when a police officer has reasonable cause to believe that his behavior warrants another investigation for criminal activity, and therefore cannot know when refusal to identify

himself will be a crime," Lawson v. Kolender, 658 F.2d 1362, 1370 (9th Cir. 1981).

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Amicus Brief

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NO. 81-1320

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KOLENDER, et al.,

Appellants,

v.

EDWARD LAWSON,

Appellee.

ON APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF NATIONAL LAWYERS GUILD, SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES, NATIONAL CENTER FOR IMMIGRANTS RIGHTS, INC., AND MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND

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No. 81-1320

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KOLENDER, et al.,

Appellants,

v.

EDWARD LAWSON,

Appellee.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLEE

Applicants ask leave of this court to file an Amici Curiae Brief in support of Edward Lawson.

a. Interest of Amici Curiae.

Amicus Curiae National Lawyers Guild is a national association of lawyers, law students and legal workers concerned with the protection and advancement of the civil and constitutional rights of individuals and groups.

Amicus Curiae Southern Christian Leadership Conference of Greater Los Angeles is an

organization dedicated to human rights, civil rights and personal freedom.

Amicus Curiae Mexican American Legal Defense and Education Fund is an organization dedicated to protecting and advancing the civil and constitutional rights of Hispanics in the United States through litigation and education.

Amicus Curiae National Center for Immigrants Rights, Inc. represents the interests of those persons whose rights are affected by their status as immigrants and refugees.

Amici uniformly fear that §647(e) is applied in a discriminatory fashion against people of color as well as unpopular groups and individuals. Its vague and arbitrary standards facilitate intentional and unintentional excesses of police officers in its application.

b. Summary of Argument

Section 647(e) encourages arbitrary and discriminatory arrests in violation of the 4th and 14th Amendments to the United States Constitution. Section 647(e) runs afoul of the 14th Amendment prohibition against vagueness

because it fails to provide adequate guidelines for, and limits on, the exercise of discretion by law enforcement officials in determining when to stop, interrogate and arrest an individual. Even when administrative guidelines and training programs are taken into account police are left without adequate standards to determine the propriety of a field stop. They retain virtually unfettered discretion to make such stops. Compounding the lack of standards to limit police discretion is the impact of modern police philosophy which encourages agressive preventive patrol. These factors combine to result in a significant number of people being detained without reasonable suspicion that they are engaged in criminal activity.

By legitimizing arrests for the failure to identify oneself, §647(e) subverts the historic requirement that an arrest be based upon probable cause. Even when the statute is aimed at suspicious activity, §647(e) promotes

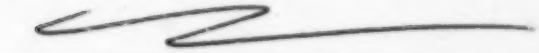
the arbitrary assumption that the failure to identify oneself will invariably be the factor that ripens an officer's suspicion of criminal activity to probable cause justifying arrest.

The proclivity of police to stop persons without reasonable suspicion of criminal activity has a disproportionate impact in minority communities. Race alone has often become the salient factor in determining suspiciousness. As a result minorities are especially susceptible to arbitrary detentions and arrest pursuant to §647(e). The use and mis-use of this statute has generated hostility and resentment against the police in minority communities.

Section 647(e) harms the public's interest in creating respect for the police and civil authority in general by generating hostility and resentment among innocent persons caught within its web. Because of the statute's potential for abuse in minority communities and against unpopular groups the balance must

tip in favor of the individual's privacy, requiring that §647(e) be declared invalid.

Respectfully submitted,



DAN STORMER
Counsel for Amici Curiae

ARGUMENT

SECTION 647(e) VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS

This court, in Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), ruled that a penal statute was void for vagueness because it did not give individuals fair notice of the conduct proscribed and because it encouraged arbitrary arrests and convictions. The constitutional violation lay in both the failure to provide adequate notice of the offending conduct and the failure to limit the exercise of discretion of law enforcement officials. Amici Curiae will address the latter because:

> [P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement.

Smith v. Goguen, 415 U.S. 566, 574 (1974).

Clear standards to guide police officers in citizen encounters are necessary to prevent a "standardless sweep (which) allows policemen . . . to pursue their personal predilections." Id. at 575. Such law enforcement cannot be entrusted "to the moment-to-moment judgment of the policeman on his beat". Id. at 575, citing Gregory v. City of Chicago, 394 U.S. 111, 120 (1968) (Black concurring). Dunaway v. New York, 442 U.S. 200, 213 (1979).

The danger inherent in §647(e) of the California Penal Code is that under its provisions police officers engaged in the "competitive enterprise of ferreting out crime" are given the power to stop a "suspicious individual" and force that person to provide some ill-defined form of self-identification or risk arrest. The statute does not provide an officer coherent guidelines or limits on the exercise of power. The failure to establish meaningful standards for justifying a field stop, demand for identification,

and arrest makes detentions and arrests pursuant to §647(e) subject to arbitrary and discriminatory enforcement. Thus, it violates the 14th Amendment.

Because §647(e) involves searches and seizures, the 14th Amendment's standards intersect with those of the 4th Amendment's prohibition against unreasonable searches and seizures. This Court has not wavered from the 4th Amendment principle that an arrest must be based on probable cause. Beginning with Terry v. Ohio, 392 U.S. 1 (1968), however, this Court has recognized that the 4th Amendment sanctions "narrow" exceptions to the general rule requiring probable cause in cases where seizures of persons are substantially less intrusive than arrests. The reasonableness of "investigatory stops" and detentions considered in Terry and its progeny have been tested by weighing the governmental interest and the individual's right to personal security free from

arbitrary interferences by law officers. Brown v. Texas, 443 U.S. 47, 50 (1979). An essential teaching of this Court's 4th Amendment jurisprudence is that a constitutional balance can be achieved between these competing concerns only when the suspicion on which a stop is predicated is based on specific, objective facts. Brown, supra, at 52; Terry, supra, at 21. Section 647(e) does not provide sufficient guidelines to prevent police abuse. Further, it allows arrests not based upon probable cause or specific, objective facts. It does this by raising the single factor of failure to identify oneself (after a Terry stop) from among many factors to the level of a crime.

a. Section 647(e) is so vague that even with police administrative standards and training programs there is no real guidance to patrol officers.

The task of formulating a meaningful standard for conducting a field interrogation to guide patrol officers remains to be accomplished.

> The standard which administrative officials urge the patrol officer to utilize in deciding whether to investigate is usually not specifically articulated; the term suspicious person may be used but left undefined, and this may be combined with statements about the need for the officer to exercise common sense gained through expertise in the field. When definition of the standard is undertaken in police literature, the level of generality varies considerable.[1/]

Police department manuals frequently consist of a list of factors to be taken into consideration in making a field stop and interrogation without any indication of how significant each factor may be.[2/] The

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1/ Tiffany, McIntyre and Rotenberg, Detection of Crime: Stopping and Questioning Search and Seizure, Encouragement and Entrapment, 38-43 (Boston: Little Brown and Co., 1967).

2/ Id. at 40-43.

looseness of police standards for field interrogation practices was noted in a study commissioned by The President's Commission on Law Enforcement and the Administration of Justice.[3/] The study found that some police agencies indicated they did not have a field interrogation program. A review of their department manuals revealed, however, that patrol officers were held responsible for developing their own procedures for handling such field interrogations.[4/]

The failure to develop administrative guidelines has forced individual officers to rely on their own intuitive judgment to determine when a field interrogation and arrest is justified. A 1975 Police Foundation

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3/ National Center on Police and Community Relations, School of Police Administration and Public Safety, A National Survey of Police and Community Relations (East Lansing, Michigan State University, 1967).

4/ Id., p. 329.

study of the San Diego Police Department found that the field interrogation decision "rests on the officer's subjective (sometimes intuitive) conclusion that the appearance, demeanor, or activities of the potential subject are not normal for the particular time, place and circumstances under which they are observed".[5/]

A more recent study of four Southern California communities found that police administrators and field supervisors in fact have little influence or actual control over field officers' routine decisions.[6/]

Just as field manuals are often irrelevant or unhelpful to actual field interrogations,

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5/ J. Boydston, San Diego Field Interrogations: Final Report 7 (Police Foundation 1975).

6/ Brown, Michael K., Working the Streets, Police Discretion and the Dilemma of Reform, 89-99, 136-7, 178, (See Table 5.1 and 5.7) (New York: Russell Sage Foundation 1981); Tiffany, McIntyre and Rotenberg, Detection of Crime, supra, pp. 89-90.

much of a police recruit's formal academy training seems to be lost when the officer goes into the field. Confronted with "reality shock," the new officers often adopts the informal practices of experienced officers, negating a great deal of the academy training.[7/] In addition a study by William Westley indicates that during police training, new officers are exposed to peer pressures and internal operating norms which emphasize differential treatment of disrespectful, powerless and minority citizens.[8/] These factors may well account for the disturbing results of studies which

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7/ American Bar Association, Project on Standards for Criminal Justice: The Urban Police Function, 209 (1973).

8/ Westley, William A., Violence and the Police: A Sociological Study of Law, Customs and Morality, 154-159. (Cambridge; The M.I.T. Press, 1970).

show that racial prejudice[9/] among police officers drastically increases as a function of time spent on the police force.[10/]

Recognizing that field training programs would not only cushion "reality shock" but also help establish good work habits for future job performance, the National Manpower Survey of the Criminal Justice System (NMS), mandated by Congress in the 1973 Crime Control Act, surveyed field training

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9/ As a result of this prejudice, for example, the use of racial epithets by police in street contacts is widespread and often ". . . chosen deliberately to demean the citizen . . ." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, 180, 182 (1967).

10/ See Ford, Meeker & Zeller, Police, Students and Racial Hostilities, 3 J. Police Sci. & Ad. 9 (1975); Reese, Police Academy Training and Its Effects on Racial Prejudice, 1 J. Police Sci. & Ad. 257 (1973); Teahan, A Longitudinal Study of Attitude Shifts Among Black and White Police Officers, 31 J. Soc. Issues, 47 (1975).

programs.[11] The NMS study found that despite general recognition of its importance, only slightly more than one-third of all responding law enforcement academies offered field training. In those which did, structured field programs were seldom offered and in some instances experiential training was provided simply by having the new recruits ride with experienced officers.[12]

This practice only serves to foster the adoption of informally learned, peer-influenced field practices, which are not subject to review or control.[13] The NMS survey findings

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[11] National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice: The National Manpower Survey of the Criminal Justice Education and Training 303-306 (1978).

[12] Id. at 305.

[13] See Bent, Alan E., The Politics of Law Enforcement, 36 (Lexington, Mass.: D.C. Heath & Co., 1974).

are corroborated by other literature on the subject of officer training for field interrogations.

> Field training is rarely formal, often poorly conceptualized and usually pitifully meager. So-called field training experiences are very short and trainees are given little if any opportunity to reflect on, discuss, and understand their experience.[14/]

Thus, it is clear that police manuals and training programs do not, and cannot be expected to, establish meaningful standards by which officers may make decisions to stop and interrogate under §647(e).

b. Little control exists over an officer's discretion to interrogate and arrest an individual pursuant to §647(e).

Numerous research studies indicate that factors such as race, sex, age, general

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14/ Wassermen and Couper, Training and Education, In: Police Personnel Administration, 129 (O. Glenn Stahl and Richard A. Staufenberger eds., Police Foundation, 1974).

appearance, demeanor, and social class routinely influence an officer's decision whether to stop and arrest an individual.[15]

Unfortunately, of these, race is perceived by officers as the most salient factor in determining suspiciousness.[16]

With the modern-day reliance on police patrol by automobile, police contact with the community is often arbitrary and fragmented. "Modern patrolmen do not so much involve themselves with people as they observe

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15/ Tiffany, McIntyre & Rotenberg, Detection of Crime, supra, pp. 38-43. See also Lundman, Richard J., Police Misconduct, In: Police Behavior, A Sociological Perspective, edited by Richard J. Lundman 169-171 (New York: Oxford University Press, 1980); L. Radelet, The Police and the Community 158-161 (2d ed. 1977); R. Trojanowicz & S. Dixon, Criminal Justice and the Community, 80-82 (1974); Bogomolny, Street Patrol: The Decision to Stop a Citizen, 12 Crim. L. Bull. 544, 567-74 (1976); Reed & Reed, Status, Images and Consequences: Once a Criminal, Always a Criminal, in Images of Crime: Offenders and Victims (T. Thornberry & E. Sagarin eds. 1974).

16/ Brown, Working the Streets, supra, p. 166.

from a distance."[17] Obstacles to an officer's accurate observation include physical limitations such as vantage point and distraction as well as operational style,[18] mood, prejudice, past experience patterns, or simply an inadequate knowledge of the field.[19]

These factors are too complicated to codify in any usable, coherent fashion, and are usually not specifically articulated by police administrators.[20] Consequently,

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17/ Id. at 71.

18/ The operational style of a police officer has a tremendous impact on the exercise of discretion to stop an individual for field interrogation. This observed behavior is the subject of the following two studies: Wilson, James Q., Varieties of Police Behavior: The Management of Law and Order in Eight Communities (Cambridge, Mass.: Harvard University Press, 1968); Brown, Working the Streets, supra.

19/ Brown, Working the Streets, supra, Chapters 6, 7, 8.

20/ Tiffany, McIntyre & Rotenberg, Detection of Crime, supra, pp. 38-43.

officers in large part make an ad hoc, intuitive determination whether to stop an individual for a field interrogation.

The lack of control over police discretion was documented in the Police Foundation study of San Diego Police Department field practices which showed that in practice police officers did not follow administrative guidelines for field interrogations based on the Terry standard. The San Diego study indicated that field stops were commonly made because the subject pedestrian, in the stopping officer's words, "didn't look right," or because the patrol officer involved caught sight of a vehicle and "didn't like the looks of [the] driver and passenger."[21/]

Given the vast range of subjective factors which inevitably influence an officer's discretion to stop an individual, it is reasonable to assume that a significant number of §647(e) detentions will be based

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21/ Boydston, San Diego Field Interrogations: Final Report, supra, at p. 3.

solely on subjective factors. These will be made by officers who will be unable to point to objective facts indicating that the particular individual stopped and interrogated was involved in a specific criminal activity.[22/]

The potential for abuse encouraged by §647(e) contrasts with the proper scope of detention under the Terry standard. In a Terry stop, a person will be detained or frisked and let go if no criminal or potentially criminal activity is found. Under §647(e) even if no criminal activity is discovered through the stop (and since it incorporates Terry, the permissible frisk), the simple factor of failing to provide

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22/ Muir, Jr., William Ker, Police: Street Corner Politicians, 164-165, fn. 14 (Chicago: University of Chicago Press, 1977); 2 National Institute of Enforcement and Criminal Justice, Improving Patrol Productivity, 5 (1977); Reiss, Albert, Jr., The Police and The Public, 129-131. (New Haven: Yale University Press, 1971).

self-justification can result in a criminal conviction. This lack of control, combined with racial stereotyping and prejudice, allows §647(e) to be used for arbitrary and discriminating field interrogations and arrests.

c. The tendency of police officers to arbitrarily enforce §647(e) has a disproportionate and discriminatory impact in minority communities.

Crime prevention is, quite properly, one of the primary goals of most police officers and departments.[23/] In pursuit of this goal, however, many police departments have adopted a proactive patrol mode, i.e., they are frequently to be found in an automobile or on foot in patrol areas with no specific

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23/ 1 G. Kelling, T. Pate, D. Dieckman & C. Brown, The Kansas City Preventive Patrol Experiment: A Technical Report 4 (1974).

duty except "showing the flag" and looking for trouble and troublemakers.[24] They are there ". . . to create an atmosphere of police omnipresence which will dissuade persons from attempting to commit crimes because of the likelihood of their being detected and apprehended."[25]

In short: "[P]olice administrators feel that stopping and questioning of suspects has a substantial crime prevention function whether or not the police discover adequate grounds to arrest and prosecute."[26]

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[24] These police patrol activities are tolerated and even encouraged because "[i]t is generally assumed that police have a preventive and protective role as well (as an investigative one)." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, 3 (1967).

[25] Id., p. 23. See also Bristow, Field Interrogation, 5 (2d ed. 1964).

[26] Tiffany, McIntyre, and Rotenberg, Detection of Crime, supra, p. 16; Few police administrators or patrol officers view stop-and-frisks as narrowly limited to investigatory functions. The assumption, in fact, has long been directly to the contrary. Effective Police

In this proactive patrol mode, officers are not responding to calls for assistance but rather they are looking to detect and prevent crime. The core of much of this work has become the aggressive investigation of suspicious persons and circumstances by stopping, questioning, frisking and searching

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[Footnote 26, continued]

Administration 402, 418 (H. More ed. 1975); H. Packer, The Limits of the Criminal Sanction 183 (1968); A. Reiss, supra, at 53-120; Kuykendall, Styles of Community Policing, 12 Criminology 229 (1974); Larson, Crime Prevention on Patrol, Police Chief 56 (June 1976); Tiffany, Field Interrogation: Administrative, Judicial and Legislative Approaches, 43 Denver L.J. 389, 395-98 (1966); Younger, Stop and Frisk: 'Say It Like It Is', 58 J.Crim. L.C. & P.S. 293, 294 (1967); Note, Detention, Arrest, and Salt Lake City Police Practices, 9 Utah L.Rev. 593, 610-16 (1965); Note, Orders to Move On and the Prevention of Crime, 87 Yale L.J. 603, 604 (1978); I G.Kelling, T. Pate, D. Dieckman, & C. Brown, The Kansas City Preventive Patrol Experiment, supra, p. 1. See also R. Fogelson, Big City Police (Cambridge, Mass.: Harv. U. Press, 1977).

individuals.[27]

In his study Working the Streets, Michael K. Brown found that a majority of patrol officers surveyed believed an aggressive patrol presence deterred crime and over 80% believed that aggressiveness meant that "in some neighborhoods" rigorous extra-legal law enforcement and stop-and-question tactics were justified. Competence as a police officer was perceived to demand an aggressive predisposition to take extra-legal actions when deemed necessary, or to act in a brusque and discourteous manner.[28]

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[27] Reiss, The Police and the Public, supra, pp. 88-114. Officers are under substantial pressure from their superiors to conduct aggressive patrols. J. Robertson, City Police, 43-48 (1973), Brown, Working the Streets, supra, Chapter 6, esp. pp. 138-141; Bogomolny, Street Patrol, supra, p. 551.

[28] Brown Working the Streets, supra, pp. 163-169 (See Table 6.3).

As proactive patroling of communities has established itself as a dominant operational style of police officers, police stops for field interrogations of suspicious persons has itself caused substantial discord in citizen/police relations.29/

> Misuse of field interrogations, however, is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive control' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. 30/

The inclination towards "aggressive patrol" has its greatest impact in the minority community where police officers have a well documented tendency to maintain

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29/ Fogelson, Big City Police, supra, pp. 183, 184, 187, 241, 242.

30/ The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, 184 (1967) See Terry v. Ohio, supra, 392 U.S. at 14 (fn. 11).

negative stereotypical images of minority citizens. Research studies have observed that police officers perceive black citizens, for example, as more likely to be armed and dangerous, and to engage in criminal activity.[31/]

In these cases, the officer often relies upon indicators such as appearance and incongruity which presuppose that the officer has knowledge of the character and intent of the person being detained. Unfortunately these indicators are inevitably derived from and reflect the bias and prejudices of general

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31/ Skolnick, Jerome H., Justice Without Trial: Law Enforcement in a Democratic Society, 65-67, 80-87 (New York: John Wiley & Sons, 1967); Werthman and Piliavin, Gang Members and the Police, In: The Police, Six Sociological Studies, Edited by David Bordua, 56-98 (New York: John Wiley & Sons, 1967); Brown, Working the Streets, supra, pp. 170-177; Wilson, Varieties of Police Behavior, supra, pp. 96-104.

racial and social stereotypes.[32] As a result, race becomes the salient indicator of suspiciousness when minorities are found, for example, outside minority neighborhoods.[33]

Police officers often point to their experience and crime statistics to justify their belief that minorities have a greater propensity to commit crimes. Yet these beliefs are ultimately a self-fulfilling prophecy: ". . . [C]oncentrating on the activities of a particular sub-group may lead

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32/ L. Radelet, The Police and The Community, supra pp. 158-61; R. Trojanowicz & S. Dixon, Criminal Justice and the Community, supra pp. 80-82; Bogomolny, Street Patrol, supra pp. 567-574; Reed & Reed, Status, Images and Consequences, supra.

33/ Brown, Working the Streets, supra, p. 166; Skolnick, Justice Without Trial, supra, p. 86; American Law Institute, Code of Pre-Arraignment Procedure, Commentary 273 (1975).

to biased estimates of the propensity of that group to commit crime."[34/] For example, as the court in Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (1970) aff'd and modified on other grounds, 472 P.2d 631 (9th Cir. 1972), found:

> Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, Negroes nationally compose some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as "suspicion arrests." [35/]

[34/] Brown, Working the Streets, supra, p. 177. See also Forslund, Morris A., A Comparison of Negro and White Crime Rates. Journal of Criminal Law, Criminology and Police Science, 61, 214-217 (1970). Moreover, discrimination in the enforcement of criminal laws can permeate all levels of a legal system. Zeisel, Hans, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 956 (1981).

[35/] See also Arrest Records as a Racially Discriminatory Employment Criterion, 6 Harv. C.R. C.L. L. Rev. 165 (1970) for an analysis of Gregory, supra.

Because minorities are singled out as having a propensity for engaging in crime, "aggressive patrol" practices have particularly grave implications when considering the potential for the arbitrary and discriminatory abuse of §647(e).

Minority citizens are more likely than the population at large to be stopped and interrogated for no objectively justifiable reason as a result of preventive policing practices. For instance, a 1973 police study showed that Black males are far more likely to be stopped and interrogated than would be expected based upon arrest records.[36/] Thus, they are more frequently subject to arrest upon refusal to identify themselves, even though no reasonable and particularized suspicion prompted their stop, detention, and interrogation in the first place. The potential for abuse in the application of §647(e) in the minority community is

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36/ Bogomolny, Street Patrol, supra, pp. 571-572 (Table 2).

heightened when the inclination to be aggressive is considered in combination with the demonstrated propensity of officers to discriminate against individuals who do not defer to police authority.[37] (See section d, infra.)

The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, (1967)[38] states:

37/ See L. Radelet, The Police and The Community supra; M. Skies, The Administration of Justice (1975); J. Skolnick, Justice Without Trial, supra, at pp. 80-83; Rafky, Police Race Attitudes and Labelling, I J. Police Sci. & Ad. 65 (1975). See also Supplemental Studies for the National Advisory Commission on Civil Disorders (1968) Rafky, Thibault, & Lynch, Are Cops Prejudiced? 40 Police Chief 60 (1973); Swan, The Politics of Identification: A Perspective of Police Accountability, 20 Crime & Delinquency 119 (1974).

38/ Published in the Report of the National Advisory Commission on Civil Disorders, 556 (1968).

> 'Harassment' or discourtesy may not be the result of malicious or discriminatory intent of police officers. Many officers simply fail to understand the effects of their actions because of their limited knowledge of the Negro community. (M)any departments have adopted patrol practices which in the words of one commentator have '. . . replaced harassment by individual patrolmen with harassment by entire departments.'

Although police officers are to a considerable extent the victims of community problems not their own making, they are nevertheless viewed in minority communities as a symbol of frustration and the agents of a society responsible for their deplorable condition.[39/] Because of this well-documented hostility among minority communities towards

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39/ The President's Commission on Law Enforcement and Administration of Justice, Task Force Report, supra, pp. 146-187; Hahn, Ghetto Assessment of Police Protection and authority, 6 Journal of Law and Society 183 (1971); Bent, The Politics of Law Enforcement, supra p. 42; Baldwin, James, Nobody Knows My Name 65-67; (New York, Dell Books, 1962) Skolnik, Justice Without Trial, supra, pp. 49, 80-87; Werthman and Piliavin, Gang Members and the Police, supra, pp. 56-98.

police,[40/] the analysis of situations through use of stereotypes and such subjective appraisals as the "attitude test" (see discussion d infra) has a distinctly discriminatory effect when police officers deal with minority citizens. They are far more likely to be stopped, interrogated, and arrested under §647(e). Further, because many minority citizens view police field interrogation practices with hostility and suspicion, they are more likely to withhold deference for police authority in such encounters, and, will as a result, ultimately face retaliatory arrest under §647(e).

d. Police reliance on the "attitude test" results in arbitrary and discriminatory arrests pursuant to §647(e).

40/ See, e.g., R. Trojanowicz & S. Dixon, Criminal Justice and the Community, supra pp. 82-96

Because police patrol work often calls for intervention in social situations where the potential for violence is unknown, many police officers believe that their essential first task is to establish their authority. It has been suggested that police officers, as governors of others, group people according to their governability: "The elemental grouping, upon which more subtle but less basic breakdown depended, was the separation of people into the governables and the rebels. The paramount judgmental task was separating those who might revolt against police authority from those who might not."41/

The litmus test by which the attitude of individuals stopped in street encounters is analyzed has been referred to by many scholars as the "attitude test." Most officers believe that if they have stopped someone, the detention, ipso facto, is for

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41/ Muir, Police: Street Corner Politicians, supra, pp. 156-171.

a good reason.[42] As a result, police enter into these encounters with the expectation that people will recognize the legitimacy of the encounter and will, therefore, have a polite and deferential attitude in response to the officers' show of authority.[43] Observations by social scientists of police/citizen encounters reveal that police behavior can often be successfully predicted on the basis of the detained individual's "attitude", particularly his or her deference to police authority. These observations indicate that an officer

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42/ Brown, Working the Streets, supra, pp. 196-198.

43/ See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, supra, pp. 180, 182, for how this authority is often expressed to a citizen in a racially derogatory manner.

is more likely to arrest an individual when deference is withheld.[44/]

As a cue for determining suspiciousness, the attitude test is inherently unreliable. For instance, the refusal to cooperate or defer to police authority may take the form of refusing to identify oneself or to explain one's circumstances. It is doubtful whether all persons who refuse to cooperate during field interrogations fear discovery that they are about to commit or have committed a criminal offense. Innocent persons may well be appropriately indignant as to the accusations implicit in a field stop for interrogation.

44/ Reiss, Police and the Public, supra, pp. 57-60, 136, 149. Westley, Violence and the Police, supra, pp. 119-128; Wilson, Varieties of Police Behavior, supra, p. 37; Tiffany, McIntyre and Rotenberg, Detection of Crime, supra, pp. 58-64; Lundman, Police Behavior, a Sociologoical Perspective, pp. 191-95. Brown, Working the Streets, supra, pp. 196-201.

A study conducted by Wiley and Hudik reveals that the decision to cooperate with an officer is influenced by factors completely extraneous to the detained individual's connection with criminal activity.[45/]

Nonetheless, a common police reaction to the refusal of an individual to cooperate with an interrogating officer is an assumption of guilt. Officers commonly believe they should threaten arrest as a response.[46/] The transcript of Mr. Lawson's trial dramatically illustrates this, e.g., see R.T. 340 where Mr. Lawson's refusal to answer was claimed to be proof to the officer that he was guilty of something. Section 647(e) unconstitutionally

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45/ Wiley, Mary Glen and Hudik, Terry L., Police-Citizen Encounters: A Field Test of Exchange Theories, In: Police Behavior: A Sociological Perspective, edited by Lundman (1978).

46/ Tiffany, McIntyre and Rottenberg, Detection of Crime, supra, p. 59; Brown, Working the Streets, supra, pp. 176-178, 198.

serves to legitimize such arbitrary and dysfunctional police/citizen contacts. Suspicions are improperly raised and the threat of arbitrary arrest heightened simply because the individual detained does not choose to defer to the officer. When this is viewed in light of the racial prejudice existing within many police forces, §647(e) provides a forum for the abuse of unpopular and minority groups. It allows a police officer to punish by means of criminal prosecution defiance of a police request for identification where no substantive criminal offense has been discovered.

e. <u>On balance, the Government interest is not served by the use of §647(e)</u>.

Any claimed government interest in §647(e) is outweighed by the public's negative perceptions of its arbitrary use, as well as the low yield of criminal activity ferreted out.

In a study of 5,998 stops such as allowable under §647(e), only 78 criminal acts were discovered - 60 for traffic citations and 18 for what may have been minor infractions.[47/] Similarly, another survey of police/citizen contacts revealed that of 11,244 such contacts, only 1,488 produced suspects of criminal activity. Twenty per cent of these people were searched and, of these, only 25% led to a finding of criminal activity.[48/] Seventy-five per cent were searched by a police officer based only upon a faulty analysis of reasonable suspicions.

Further, these field interrogations have "no significant impact either on the level of crime or the public's feeling of

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47/ Bogomolny, Street Patrol, supra, pp. 567, 571-577.

48/ Studies of Crime and Law Enforcement in Major Metropolitan Areas, Vol. II, Section I (1967) - cited in American Law Institute, supra, p. 275.

security.[49/]

The Terry exclusionary rule, intended to restrain unreasonable searches and seizures, does not deter police officers from undertaking stops - unless the officers fortuitously discover evidence of crime in the course of the encounter and it, in fact, is excluded by the courts. Such §647(e) stops are only effective as a deterrent in cases where actual criminal prosecution against the detained individual is the primary goal of the stop, not where vague, generalized notions of direct or secondary crime prevention, maintenance of order, social control, or outright

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49/ 1 G. Kelling, T. Pate, D. Dieckman & C. Brown, The Kansas City Preventive Patrol Experiment, supra, at iii. See also, Tytell, Citizens, Patrol Commanders, and the Kansas City Preventive Patrol Experiment, Police Chief 42 (Nov. 1975); Bogomolny, Street Patrol, supra, pp. 550-553.

harassment are aims of the encounter.[50]

Rather, these stops have the significant effect of creating hostility in the community, particularly among unpopular and minority groups who are singled out for field interrogations, and, ultimately, arrests.[51]

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[50] Reich, Police Questioning of Law Abiding Citizens, 75 Yale L.J. 1161, 1166 (1966). See, e.g., LaFave, Improving Police Performance Through the Exclusionary Rule - Part I: Current Police and Local Court Practices, 30 Mo. L. Rev. 391, 421-58)1965).

[51] Fogelson, Robert M., Big-City Police, supra, pp. 183, 184, 187, 231-242. See also Bogomolny, Street Patrol, supra, pp. 567-573, showing that black males and people under 21 are far more likely to be stopped and interrogated than comparable arrest or population statistics should allow. Further, "Misuse of field interrogations, however, is causing serious friction with minority groups in many localities." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, supra, p. 184.

There exists "evidence which indicates a substantial negative yield is possible from too frequent or insufficiently restrained intervention with citizens."[52/] This conclusion corresponds directly with a study of the San Diego police field interrogating practices.

> Extensive and detailed empirical studies revealed great hostility resulting from the widespread use of field interrogations in San Diego. In that city, approximately 200,000 such field interrogations are reported annually for a city of about 600,000 people. Although it is not clear what proportion of these would be considered stops in the terms of this Code, many of these encounters were perceived to be peremptory and coercive. 53/

Unfortunately, the costs of such focused law enforcement fall most heavily on innocent citizens. As Jerome Skolnick noted: "If an honest citizen resides in a neighborhood heavily populated by criminals, just as the

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52/ Bogomolny, Street Patrol, supra, p. 557.

53/ American Law Institute, supra, p. 274.

chances are high that he might be one, so too are the chances high that he might be mistaken for one."[54/]

The interests of society are not enhanced by a statute such as this which more often than not catches innocent people in its broad net. It serves only to further antagonize an already alienated portion of society while being of questionable value in apprehending or preventing crime. It does not meet the balancing test set forth in Brown v. Texas, supra.

54/ J. Skolnick, Justice Without Trial supra, p. 218.

CONCLUSION

One of the hallmarks of a free society is the right to be left alone: the right to walk the streets, to drive a car, to ride a bicycle, or to sit in one's yard, free from the threat of uninvited and unwarranted governmental questioning, observation, or intrusion. As Justice Frankfurter observed, "[t]he security of privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment - is basic to a free society." Wolf v. Colorado, 338 U.S. 25, 27 (1949).

Section 647(e) subverts all this. It has vague, undefined, unenforceable standards which provide little or no guidelines for the officer and no real protection for the citizen against unreasonable searches and seizures.

The facts of Mr. Lawson's case aptly describe the problems. Mr. Lawson was stopped

15 times in a variety of circumstances, all based on varying standards. He was never charged with a crime - except the failure to identify himself. This failure to identify, even with no underlying criminal activity, becomes ultimately a crime in and of itself.

While a Terry stop based on reasonable suspiciousness is permissible, §647(e) allows one factor of suspiciousness to ripen into a crime rather than simply being counted among a number of considerations to be examined before an arrest is made.

Section 647(e) is an uncontrolled, and uncontrollable, weapon which can be aimed at unpopular groups, particularly minority groups. Its failure to provide guidelines results in arbitrary and discriminatory enforcement. Its actual use has caused, and will cause, hostility and anger in minority communities. It should be declared unconstitutional.

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Amicus Brief

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IN THE

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October Term, 1981

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Defendants-Appellants,

v.

EDWARD LAWSON,

Plaintiff-Appellee.

On appeal from the United States Court of Appeals, Ninth Circuit

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

Interest of Amicus Curiae and Consent

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have a substantial impact upon the rights of many persons represented by this office, as well as the public as a whole, to due process of law. Accordingly, the State Pub-

lic Defender of California is filing this brief amicus curiae in support of appellee.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Consent to filing of the brief has been given by counsel for appellee and appellants, respectively. Letters reflecting such consent have previously been filed with the Clerk of this Court.

Summary of Argument

At issue is the validity of California Penal Code section 647 (e). As argued *infra,* this statute is inherently vague and indefinite, encourages arbitrary enforcement, and violates First, Fourth and Fifth Amendment rights. As such, it should be declared unconstitutional.

This brief is divided into three sections. The first sets out a brief overview of the vagueness doctrine. The second delineates the historical evolution of section 647 (e) from a traditional vagrancy law based upon status to a law defining a crime of conduct. The third analyzes the statute in terms of the various concerns of the vagueness doctrine and explains how the statute violates several fundamental constitutional rights.

ARGUMENT

CALIFORNIA PENAL CODE SECTION 647(e) IS INHERENTLY VAGUE AND INDEFINITE AND SHOULD BE DECLARED UNCONSTITUTIONAL

A. *The Vagueness Doctrine*

Rooted in the Fifth and Fourteenth Amendments, the void-for-vagueness doctrine is one of the bedrock principles of American Constitutional law. Simply stated, the doctrine provides that a penal statute is void if it proscribes "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *(Connally v. General Construction Co.* (1926) 269 U.S. 385, 391; see also, *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453.)

More specifically, the vagueness doctrine may be subdivided into three related concerns: providing fair notice of what a statute prohibits, protecting against arbitrary enforcement of the statute, and safeguarding constitutionally protected rights. *(Lawson* v. *Kolender* (9th Cr. 1981) 658 F.2d 1362, 1365, fn. 7; Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like,* 3 Crim. L. Bull 205, 224 (1967); Keenan, *California Penal Code Section 647e: A Constitutional Analysis of the Law of Vagrancy,* 32 Hastings L.J. 285, 294 (1980).

B. *The Evolution of California Penal Code Section 647(e)*

As currently written, California Penal Code section 647(e), provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

". . . .

"(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands such identification."

Where state courts have imposed a limiting construction on a state statute, that construction must be accepted for purposes of federal constitutional review. (*Hebert* v. *Louisiana* (1926) 272 U.S. 312, 316–317.) Thus, before subjecting 647(e) to the vagueness crucible, it is necessary to examine briefly the limiting constructions which California courts have given it.

1. *The Prevailing California Construction of 647(e)*

Section 647(e) assumed its present form in 1961. Prior to that time, California Penal Code section 647 was segmented into 12 numbered parts. It provided:

"1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or,

"2. Every beggar who solicits alms as a business; or

"3. Every person who roams about from place to place without any lawful business; or,

"4. Every person known to be a pickpocket, thief, burglar or confidence operator, either by his own confession, or by his having been convicted of any such offenses, and having no visible or lawful means

of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or,

"5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,

"6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or,

"7. Every person who lodges in any bar, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,

"8. Every person who lives in and about houses or ill-fame; or,

"9. Every person who acts as a runner or capper for attorneys in and about police courts or city prison; or,

"10. Every common prostitute; or,

"11. Every common drunkard; or,

"12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; . . .

"Is a vagrant, and is punishable . . . ."

Medieval in origin, former section 647 was like other vagrancy statutes then operative in many states. Essentially, it made status rather than conduct the basis of punishment. (See, Arthur Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision,* 48 Cal. L. Rev. 557, 562 (1960). Vagrancy was defined in terms

of being rather than in terms of acting. (*Edelman* v. *California* (1954) 344 U.S. 357, 364–366 (Black, J., dissenting). To be guilty, one had only to be in the various proscribed personal conditions denominated as "vagrancy." In *People* v. *Craig* (1907) 152 Cal. 42, 47, the unique character of vagrancy statutes was stated succinctly: "Vagrancy differs from most other offenses in the fact that it is chronic rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms."[1]

In 1960, the California Supreme Court held that section 10 of the statute, relating to "common prostitutes," was unconstitutionally vague. (*In re Newbern* (1960) 53 Cal. 2d 786.) One year later, section 4 was challenged on the same grounds in *In re Cregler* (1961) 56 Cal. 2d 308. Attempting to avoid the twin pitfalls of vagueness and penalizing status rather than conduct, *Cregler* construed the operative term in section 4—"loitering"—to mean "lingering in the designated places for the purpose of committing a crime as opportunity may be discovered." (*Id.* at 312.)

The same year *Cregler* was decided, the California Legislature, responding to a nationwide trend away from traditional vagrancy statutes, repealed and reenacted section 647 in its present form. The name of the offense was changed from vagrancy to disorderly con-

[1] The effort to declare status a crime was unequivocally condemned in *Robinson* v. *California* (1962) 370 U.S. 660, in which a California law making it a crime to be addicted to narcotics was declared unconstitutional.

duct.[2] Subdivision (e) was redrafted to comprise three elements: (1) loitering or wandering on the streets; (2) refusal to identify and account for one's presence on request; (3) in circumstances involving the public safety. (The transition of the law from a vagrancy to a conduct statute is summarized in the 1959–1962 Report of the California Assembly Interim Committee on Criminal Procedure, 22 Assembly Interim Reports No. 1 (1961).)

The new 647(e) faced its first vagueness test and received its first definitive limiting construction in *People* v. *Weger* (1967) 251 Cal.App.2d 584. In construing the words "loitering" and "wandering" the court held:

> "As now written, section 647, subdivision (e), does not make loitering and wandering upon the streets or from place to place without apparent reason or business without more a punishable offense. *As there used the words do not connote unlawful activity.* [Citation omitted.] They do no more than describe the person who may be asked by a peace officer to identify himself and to account for his presence in the prescribed circumstances. . . ." (*Id.* at pp. 592–593, emphasis added.)

"Loitering" and "wandering" were to be given their common dictionary definitions. "Loitering" meant "[t]o be slow in moving; delay; linger; saunter; lag behind." (*Id.* at p. 591.) "Wandering" connoted "1. To

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[2] Many commentators have referred to statutes like 647(e) as "stop-&-identify" laws. (See e.g., Comment, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem,* 12 Rutgers Law Journal 585 (1981).)

ramble without a definite purpose or objective; roam, rove, or stray: . . . 2. to go aimlessly, indirectly, or casually." (*Id.* at p. 592.)

Weger ruled that these definitions were not unreasonably vague because the new statute did not penalize mere loitering or wandering. Rather, it proscribed only loitering and wandering which were accompanied by a refusal to identify oneself when public safety required identification.

Weger also held that the statute's identification and public safety elements satisfied constitutional standards. The phrase "identify himself" was given its lay meaning —namely, that the suspect must establish that he is the person he purports to be. (*Id.* at p. 593.) Similarly, the phrase "account for his presence" was given its ordinary meaning—i.e. to furnish substantial reasons or a convincing explanation for one's presence. (*Id.* at p. 594.) Finally, *Weger* construed the statute's public safety element, which allows the police to request identification under suspicious circumstances, to be analogous to police authority to "stop pedestrians or motorists on the streets for questioning under circumstances short of probable cause to make an arrest." (*Id.* at p. 595, citing *People* v. *Mickleson* (1963) 59 Cal.2d 448.)[3]

Section 647(e) received its next definitive judicial examination in *People* v. *Solomon* (1973) 33 Cal.App.3d 429.[4] *Solomon* reaffirmed the basic analysis of 647(e) as

[3] In so ruling, *Weger* anticipated the "reasonable suspicion" standard subsequently adopted in *Terry* v. *Ohio* (1968) 392 U.S. 1.

[4] Both *Weger* and *Solomon* were decided by the same appellate court: Division Two of the Second District of the California Court of Appeal.

set forth in *Weger,* pointing out that the new law marked a qualitative transition from a crime of status to a crime of conduct:

> "Under specified circumstances section 647, subdivision (e) imposes a duty on a street loiterer to respond to a peace officer's inquiry, and in default of response the loiterer may be found guilty of the misdemeanor of disorderly conduct.[1] The essentials of section 647, subdivision (e) are three: (1) loitering on the streets, (2) refusal to identify and account on request, (3) in circumstances involving the public safety.
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> "[1] The disorderly conduct statute, in large part derived from fourteenth century vagrancy laws that established crimes of status, was revised by the Legislature in 1961 to change disorderly conduct from a crime of status to one of conduct. The metamorphosis of section 647, subdivision (e) from a vagrancy statute in to its present form may be followed in Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision* (1960) 48 California Law Review 557, and in 1959–1961 Report, California Assembly Interim Committee on Criminal Procedure, 22 Assembly Interim Committee Reports No. 1 (1961)." (*People* v. *Solomon, supra,* 33 Cal.App.3d at 432.)

After affirming the basic *Weger* analysis, *Solomon* proceeded to refine the statute in light of certain United States Supreme Court decisions issued in the interim since *Weger.* These included *Terry* v. *Ohio* (1968) 392 U.S. 1, dealing with temporary detentions; *California* v. *Byers* (1971) 402 U.S. 424, concerning self-incrimination and the duty to furnish identification; and *Papachristou* v. *City of Jacksonville* (1972) 405 U.S. 156, which invalidated a traditional status-type vagrancy statute. *Solomon's* objective was to square 647(e) with each of these intervening precedents.

On the authority of a police officer under 647(e) to

detain and ask a suspect for identification, *Solomon* held that the police must satisfy the equivalent of a *Terry* "reasonable suspicion" standard before making their request:

> "The standard set out in *Terry* for the exercise of this authority is comparable to the one that brings section 647, subdivision (e) in play. Under *Terry* a peace officer is entitled to act when the information available to him warrants the belief by a man of reasonable caution that official intrusion is appropriate (pp. 20–21 [20 L.Ed.2d pp. 905–906]). Under section 647, subdivision (e) a peace officer is entitled to act when the surrounding circumstances indicate to a reasonable man that the public safety demands identification. We see no essential difference between these two formulations. Each amounts to what Justice Harlan has termed 'articulable suspicion less than probable cause.' " (*Terry* v. *Ohio*, p. 31 [20 L.Ed.2d p. 912], concurring opinion.)" (*People* v. *Solomon, supra*, 33 Cal.App.3d at 435.)

The opinion also noted that the "reasonable man" mentioned in the statute referred to the investigating officer rather than the suspect. (*Id.* at p. 435.)

Regarding the identification requirement, *Solomon* clarified *Weger* in an attempt to bring the statute into compliance with *California* v. *Byers, supra*, 402 U.S. 424, and the privilege against self-incrimination. Toward this end, *Solomon* held that the duty to produce identification was "primary and controlling" and the requirement of accounting for one's presence was secondary:

> "[W]e interpret the requirement *account for his presence* as wholly subordinate and adjunct to the

> requirement of identification, as operative only to the extent it assists in producing credible and reliable identification, for under current constitutional doctrine to require more might impinge upon the privilege against self-incrimination." (Emphasis in original.) (*People* v. *Solomon, supra,* 33 Cal.App.3d at 438.)

The duty to identify, the court elaborated, "comprehends a genuine identification, one carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." (*Id.* at p. 438.)

Solomon offers the latest and most complete judicial construction of section 647 (e). Together with *Weger*, it establishes the last word in California on the statute's three elements. As so construed, the elements of 647 (e) are as follows:

1. refusal to identify;
2. by one loitering or wandering on the streets, according to the common meaning of those terms;
3. under circumstances that a reasonable man would believe endanger the public safety—i.e., which raise a reasonable suspicion in the mind of a police officer that the loiterer or wanderer is engaging or about to engage in activity related to crime.

Proof of each element is essential to establish a violation of the statute.

2. *Both Appellants and the Ninth Circuit Have Misconstrued the Construction Placed on the Terms "Loitering" and "Wandering" by California Courts*

Relying upon *People* v. *Caylor* (1970) 6 Cal.App.3d 51, both appellants and the Ninth Circuit in its opinion in this case contend that the terms "loitering" and "wandering" carry criminal connotations. (Appellants' Brief, p. 9; *Lawson* v. *Kolender, supra,* 658 F.2d at 1365.) So construed, the terms are not to be given their common meanings. Citing both *In re Cregler, supra,* 56 Cal.2d 308, and *People* v. *Weger, supra,* 251 Cal.App.2d 584, *Caylor* held that "loitering" denoted "lingering for the purpose of committing a crime," and that "wandering" referred to "movement for evil purposes." (*People* v. *Caylor,* supra, 6 Cal.App.3d at 56.)

These limiting constructions are plainly inconsistent with the holdings of *Weger* and *Solomon, supra,* the leading California cases interpreting 647(e). As shown above, the *Cregler* definition of "loitering," which *Caylor* adopted, applied only to former section 647, a traditional status-type vagrancy statute. In 1967, *Weger* specifically rejected this limiting construction in light of the new statute's emphasis on conduct. *Caylor's* reliance upon *Weger,* therefore, is entirely misplaced. Moreover, *Solomon,* decided in 1973, fully supports the *Weger* analysis of the disputed terms. [5]

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[5] *Caylor's* limiting construction is also inconsistent with the legislative history of the statute. (22 Assembly Interim Reports No. 1, *supra,* pp. 7–19.) That history fully supports the *Weger-Solomon* treatment of the terms. Finally, *Caylor's* limiting construction would render the statute's third element, which requires police to satisfy a *Terry* standard of suspicion of criminal activity before requesting identification, redundant. The function of this third element is to connect a refusal to identify with criminal activity. If the term "loitering" itself denoted criminal activity, the *Terry* element would be unnecessary to connect the statute to criminal activity.

3. *Appellants Have Misconstrued the Nature of the Statute's Public Safety Element.*

Appellants have also misconstrued the construction which California courts have given the statute's public safety element. In their brief, appellants assert that before requesting identification from individuals, an officer "must first have articulable facts sufficient for a pat-down search." (Appellants' brief, pp. 23–24.)

This assertion is based upon a misreading of both *People* v. *Solomon, supra,* 33 Cal.App.3d 429, and *Terry* v. *Ohio, supra,* 392 U.S. 1. The *Terry* reasonable-suspicion standard contains two prongs: First, the element of reasonable suspicion that crime is afoot, which justifies a detention. And second, the element of reasonable suspicion that the person detained is armed and dangerous, which justifies a limited pat-down search. (*Terry* v. *Ohio, supra,* 392 U.S. at p. 24.) A reasonable suspicion of criminal activity alone is insufficient to warrant a pat-down. (*Powell* v. *Stone* (9th Cir. 1974) 507 F.2d 93, 96, fn. 3, rev'd on other grounds, (1976) 428 U.S. 465; see also, *Cunha* v. *Superior Court* (1970) 2 Cal.3d 352, 356.)

Obviously, what *Solomon* meant by comparing 647(e)'s public safety element to *Terry's* reasonable-suspicion standard was the first prong of the standard. Surely, *Solomon* did not intend to restrict the authority of police officers to implement 647(e) to situations when they reasonably believe a suspect is armed.[6] Appellants'

[6] Assuming arguendo that *Solomon* did construe 647(e)'s public safety element in the manner suggested by appellants, that construction would be based upon a misreading of *Terry.*

reading of *Solomon* would not permit detentions or identification requests under 647(e) unless the offender was suspected of a crime involving weapons. This makes little sense either from a constitutional standpoint or from the perspective of law enforcement.

C. *Section 647(e) Is Unconstitutionally Vague*

In spite of the California Legislature's effort to transform section 647 into a valid conduct statute, the present version of the law suffers from a myriad of drafting defects which render it unconstitutionally vague. In the following sections, each of the statute's elements will be examined in light of the three concerns of the vagueness doctrine.

1. *Due Process Notice*

a. *Loitering and Wandering:* Under *Weger* and *Solomon,* these terms are given their lay meanings, loitering denoting such acts as lingering, straying and lagging behind, and wandering referring to movement without definite purpose. As such, they must be considered unconstitutionally indefinite.

In *Papachristou* v. *City of Jacksonville, supra,* 405 U.S. 156, this court struck down a local ordinance which defined as vagrants persons, *inter alia,* who engaged in "wandering or strolling around from place to place without any lawful purpose or object." Such language, nearly identical to *Weger's* definition of wandering, completely failed to provide due process notice of the prohibited conduct. It also infringed upon such innocent acts as recreational strolling and "nightwalking." [7]

[7] According to one of the officers who arrested Lawson on one of the 15 occasions described in this case, "wandering," as used in

To quote from the opinion:

> "The poor among us, the minorities, the average householder are . . . not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. . . ." (*Papachristou* v. *Jacksonville, supra,* 405 U.S. at 162–163.)

The common meaning of "loitering" is similarly obscure. The various synonymous of "loitering"—delaying, lagging behind, lingering etc.—are simply too imprecise for a criminal statute. Just how long must one delay, lag behind or linger in order to loiter and come within the purview of the statute? How does one draw the line between lingering and simply taking one's time or relaxing? Are the physically infirm or the aged, who are slow of gait, to be scrutinized in the same way as the physically fit?

In light of *Papachristou,* the *Solomon* and *Weger* definitions of these terms must be considered unreasonably imprecise. Indeed, *Solomon* even recognizes the vagueness of these terms. *Solomon,* however, attempts to circumvent the vagueness problem by reasoning that a suspect is put on notice as to what constitutes the proscribed conduct because he must be asked for identification before any violation of the statute can occur. (*People* v. *Solomon, supra,* 33 Cal.App.3d at p. 435.) While it is true that no violation of the statute can occur until one is asked for identification, this by no means

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the statute, meant the same as "walking" (Reporter's Transcript, hereinafter referred to as "RT," 132).

affords due process notice.

The notice doctrine requires that laws be sufficiently specific to provide the public with advance warning of offending conduct. (*Papachristou, supra,* 405 U.S. 156; *Lanzetta, supra,* 306 U.S. 451.) *Solomon's* attempt to cure the notice difficulties inherent in the terms "loitering" and "wandering" may provide suspects with notice of their suspicious conduct prior to arrest but it utterly fails to do so prior to detention. This is necessarily so because the request for identification is made only after the suspect is detained. The terms, therefore, do not comport with the notice doctrine. (*Papachristou, supra,* 405 U.S. 156; *Shuttlesworth* v. *Birmingham* (1965) 382 U.S. 87; *Cox* v. *Louisiana* (1965) 379 U.S. 536, 555–558.)

Even if the restricted *Caylor* definitions of "loitering" and "wandering" are accepted as the authoritative California constructions, the terms remain ambiguous. To begin with, *Caylor's* definition of "wandering" as "movement for evil purposes" is not significantly different from the terminology disapproved in *Papachristou.* Nor is *Caylor's* construction of "loitering"—"lingering for the purpose of committing a crime"—adequate. As discussed above, the meaning of "lingering" will vary from person to person. How long must one remain in a given locale to be said to linger? An hour? Five minutes? Ten seconds? [8] The public is left to guess.

In any event, the terms "loitering" and "wandering" are unconstitutionally vague. While section 647(e) does

[8] According to another of the arresting officers in this case, standing still for ten seconds would constitute loitering (RT 335).

not penalize a person simply for engaging in either act, the statute applies only to those believed to be loiterers or wanderers. Since these terms are unclear, the statute should be declared void.

b. *Identification:* Neither *Solomon, Weger* nor any other California decision specifies what forms of identification are sufficient. If anything, *Solomon* actually aggravated the problem by expanding the requirement from mere identification to identification that provides both a reasonable assurance of authenticity and sufficient information to permit future communication with the suspect. While a current driver's license with a photograph would presumably suffice under this test, it is entirely unclear what other conceivable forms of identification, such as a library card or a rent receipt, would pass muster.

Lawson's many travails with police in San Diego County well illustrate this problem. During one of his arrests, the investigating officer took him into custody in spite of the fact that he produced a valid United States passport when asked for identification (RT 329). On another occasion, a different officer detained Lawson even after he produced his passport in order to run a warrant check on it (RT 183).

c. *Public Safety:* As interpreted by *Solomon,* 647(e) empowers police to detain individuals and request identification only when the officers satisfy a *Terry*-type standard of suspicion. Thus, not every request for identification is lawful and not every refusal constitutes a statutory violation. An individual need only produce

identification when the surrounding circumstances reasonably lead a police officer to believe the public safety is endangered.

This state of affairs leaves the individual with an unfortunate conundrum, literally requiring him to read the mind of his investigating officer. As the Supreme Court of Michigan noted in striking down a stop-and-identify statute very similar to a 647(e):[9]

> "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime. . . ." (*People* v. *DeFillippo* (1977) 262 N.W.2d 921, 923, reversed on other grounds in *Michigan* v. *DeFiilippo* (1979) 443 U.S. 31.)

Once again, the facts of the instant case clearly illustrate this problem. In no less than four of Lawson's contacts with the San Diego Police, the investigating officers had no suspicion whatever that he was involved in criminal activity (RT 33–40, 114–138, 206–241, 242–250). When Lawson was asked to produce identification on these occasions, Lawson refused and inquired instead

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[9] The Michigan statute invalidated in *DeFillippo* read:

" 'When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity.' " (262 N.W.2d at p. 923.)

into the basis of his detention. Each time, he was arrested.

2. *Arbitrary Enforcement*

Protecting against arbitrary enforcement is the obverse of the notice doctrine, applying to the police rather than the public. As the Ninth Circuit stated below, "a statute violates the due process clause when it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement." (*Lawson* v. *Kolender, supra,* 658 F.2d at 1369, citing *Papachristou* v. *City of Jacksonville, supra,* 405 U.S. 156.) To prevent this evil, penal statutes must provide explicit standards to guide those who enforce them. (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 108.) Without such standards, a penal statute leaves the police with unfettered discretion to distinguish persons behaving lawfully from their criminal counterparts. (*United States ex rel. Newsome* v. *Malcom* (2d Cir. 1974) 492 F.2d 1166; aff'd sub nom. *Lefkowitz* v. *Newsome* 420 U.S. 283.)

Section 647 (e) is susceptible to arbitrary enforcement for two reasons, corresponding to the statute's first two elements.

a. *Loitering and Wandering:* Whether the common or restricted meanings of these terms are used, they offer no definite standards to guide police discretion in deciding whom they should detain. Although the statute's third element requires law-enforcement personnel to have a reasonable suspicion of criminal activity, the statute remains applicable only to those who "loiter" or "wander." For all of the reasons discussed above in the

argument on due process notice, these terms are inherently vague. What will strike one officer as "wandering," for example, may appear to another as innocent strolling. As a result, 647(e) invites disparate, arbitrary enforcement.

b. *Identification:* Neither the statute nor the interpretive California decisional law specifies what forms of identification will suffice. One officer may accept a pictureless credit card, another may not. One may accept a voter registration card, another may not. One may accept an envelope addressed to the individual, others may not. [10] If anything, *Solomon* actually added to this confusion by expanding the statutory requirement from mere identification to identification that provides both a reasonable assurance of authenticity and sufficient information to permit future communication with the person identifying himself. Arbitrary enforcement is the end result. [11]

As Lawson's tribulations confirm, these ambiguities carry serious consequences. As previously noted, during one of Lawson's arrests, he produced a valid United States passport. This, however, was rejected and he was arrested and driven to the police station (RT 327-330). On another occasion, Lawson was detained even after

[10] In general, it can probably be presumed that people with picture identifications, such as drivers' licenses, will face a lesser likelihood of arrest than those without such identifications. The statute thus will tend to impact harder on the poor, who are less likely to possess such picture identifications than the affluent.

[11] The same problems obviously pertain to 647(e)'s requirement that an individual "account for his presence" when necessary to aid in identifying himself.

showing his passport while the investigating officer ran a warrant check on it (RT 183). On several other occasions, different officers accepted the passport as a valid identification and released Lawson from detention upon its production.

3. *Fundamental Rights and Overbreadth*

The void-for-vagueness doctrine has had particularly stringent application in areas where state regulation may overreach federal constitutional rights and other federally guaranteed personal liberties. (*Dombrowski* v. *Pfister* (1965) 380 U.S. 479; *Amsterdam, supra,* 3 Crim. L.Bull 205 at p. 224.) Section 647(e) interferes with several fundamental rights, including the following:

a. *The Right to Travel and Freedom of Association:*

The statute's first element interferes with the right to travel as guaranteed under article IV, section 2 of the United States Constitution and the right to freedom of association under the First Amendment.[12] As discussed above, the terms "loitering" and "wandering" not only are vague, they are also a "trap for innocent acts" such as recreational walking, strolling, and hiking, etc. Clearly, the elusive quality of the words "loitering" and "wandering" has a chilling effect upon people who may wish to engage in wholly innocent behavior, particularly at odd hours of the day or together with friends and associ-

[12] This court has yet to determine whether there is any constitutional distinction between interstate and intrastate travel. (*Memorial Hospital* v. *Maricopa County* (1974) 415 U.S. 250.) California courts, however, have held that no such distinction exists. (See *In re White* (1979) 97 Cal.App.3d 141, 148.)

ates whose personal appearance may be unconventional by prevailing standards. Even though such activities as strolling etc. are not specifically mentioned in the Constitution, they are nonetheless constitutionally protected. As this court commented in *Papachristou:*

> "The difficulty is that these activites are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.
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> "They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected, too, in the spirit of Vachel Lindsey's 'I Want to Go Wandering,' and by Henry D. Thoreau." (*Id.,* 405 U.S. at 164, fn. omitted.)

647(e) blatantly interferes with the exercise of these rights.

b. *The Fourth Amendment:* The statute also conflicts with the Fourth Amendment in a variety of ways. First, it subverts the basic Fourth Amendment principle of requiring probable cause to arrest. To reiterate, the statute authorizes an officer to detain a loiterer and request identification when the officer reasonably suspects the loiterer's involvement in criminal activity. If the individual declines to produce identification or the identification is deemed unreliable, the statute authorizes an

arrest. Thus, with no more suspicion of criminal activity than that needed to effect the initial stop, 647(e) permits police officers to make full-scale custodial arrests.

Such bootstrapping of reasonable suspicion to probable cause has been found unconstitutional by many federal and state courts. In *Powell* v. *Stone* (9th Cir. 1974) 507 F.2d 93, rev'd on other grounds, 428 U.S. 465, the practice was condemned as it operated in a local vagrancy ordinance nearly identical to 647(e):[13]

> "It [the ordinance] authorizes arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense. Police are duty-bound to investigate suspicious conduct, and founded suspicion will support an investigative stop and inquiry. [Citation omitted.] But more is required to justify arrest." (507 F.2d at 96.)

The Ninth Circuit adopted this reasoning in its opinion in this case. (*Lawson* v. *Kolender, supra* 658 F.2d at

[13] The ordinance which *Powell* v. *Stone* disapproved provided: "Every person is a vagrant who:
"Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (*Powell* v. *Stone, supra,* 507 F. 2d at 95.)

1367.) Similar conclusions were reached in *People* v. *DeFillippo, supra,* 262 N.W.2d at 923–924 and *People* v. *Berck* (1973) 300 N.E.2d 411, 414–415. (See also *Hall* v. *United States* (D.C. Cir. 1972) 459 F.2d 831, 835–836 [holding that a legislature may not authorize police conduct which undermines Fourth Amendment rights].)

Once again, Lawson's experiences are illustrative. Of the 15 contacts between Lawson and the police, none resulted in an arrest for anything other than a violation of 647(e).

Closely related to the bootstrapping infirmity is the issue of whether an individual detained under 647(e) can constitutionally be required to furnish identification or account for his presence. Whether such a requirement violates Fourth Amendment privacy protections was specifically left undecided in *Brown* v. *Texas* (1979) 443 U.S. 47, 53, fn. 3. There is, however, a formidable body of legal opinion holding that a suspect is under no legal obligation to answer questions in the context of a temporary detention. As Justice White wrote in *Terry,* "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." (*Terry* v. *Ohio, supra,* 392 U.S. 1, 34–35, White J., concurring.) This principle was reiterated in the dicta of *Davis* v. *Mississippi* (1969) 394 U.S. 721, 727, fn. 6, and in Justice Brennan's dissent in *Michigan* v. *DeFillippo, supra,* 443 U.S. 31.

Solomon flatly and explicitly rejected the reasoning of Justice White's concurrence in *Terry* (33 Cal.App.3d at 436). Finding that the legislative purpose behind 647(e)

was the worthy goal of crime prevention, *Solomon* simply held that 647(e)'s identification element was constitutional. (*People* v. *Solomon, supra,* 33 Cal.App.3d at 436.) In light of the above contrary authority, this conclusion should be countenanced no longer.

Assuming arguendo that an individual has no absolute right to refuse to produce identification and account for his presence during a lawful detention, the validity of 647(e)'s identification element should be tested by balancing the competing social interests on either side of the issue. As this court has often held, the test for determining the reasonableness of a particular governmental intrusion depends upon such a balancing test. (*Brown* v. *Texas, supra,* 443 U.S. 547; *Delaware* v. *Prouse* (1979) 440 U.S. 648; *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106.)

On balance, the privacy interests of the individual should prevail in this context. Clearly, the state's crime-prevention interest extends to the identification of those suspected of prohibited conduct. However, it is doubtful that a suspect's mere identification or lack thereof will often be crucial in establishing that he has in fact committed the crime which prompted his detention.

On the other hand, the burden placed on individual interests is great and constant. As this court recognized in *Brown*, an identification requirement such as that contained in 647(e) is a serious intrusion upon a person's privacy. (*Brown* v. *Texas, supra,* 443 U.S. at 52.) That intrusion, moreover, occurs whenever a person is detained under the statute, as Lawson's 15 encounters demonstrate. When weighed against the slim possibility

that an identification request will lead to an arrest or conviction of the substantive crime which prompted the detention, the balance of interests favors the individual's privacy rights.

Appellants, however, have adopted the contrary position, arguing that the identification request represents a minor disruption of privacy rights. In essence, appellants contend that the statute only becomes operative when police officers have reasonable cause to conduct a pat-down search. (Appellants' Brief, pp. 23, 24, 30.) Therefore, simply asking individuals for identification instead of patting them down constitutes a minimal intrusion. As appellants put it, "Asking identification of a person who could, under *Terry,* be patted down seems eminently reasonable." (Appellants' Brief, p. 30.) Nonsense.

Even if a request for identification is generally less intrusive than a pat-down search, 647(e) does not restrict such requests to those circumstances where police have reasonable cause to conduct a pat-down. Indeed, how could a stop-and-identify statute concerned with crime prevention be so restricted? Would any alert and competent police officer simply ask for identification and forgo a pat-down search when he reasonably believes a criminal suspect is armed and dangerous?

As explained repeatedly above, the statute's third element requires police officers to have a reasonable suspicion of criminal activity before requesting identification. But police officers are not thereby restricted to criminal activity involving the use of weap-

ons. Appellants' construction of the statute's third element and the *Terry*-type standard it embodies is entirely incorrect. So too is appellants' application of the balancing test.[14]

For all of the reasons enumerated above, 647(e) violates the Fourth Amendment.

c. *The Fifth Amendment:* The right against self-incrimination protects an individual from being compelled to incriminate himself in any manner. (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 476.) While a simple request for identification may be neutral (*People* v. *Solomon, supra,* 33 Cal.App.3d 432; *California* v. *Byers, supra,* 402 U.S. 424), the requirement that an individual "account for his presence" is not. In fact, 647(e)'s "accounting" requirement involves several risks of self-incrimination.

If, for example, the individual opts to explain his presence but the investigating officer deems the explanation unreliable, the statute authorizes an arrest. Since all three statutory elements would then be satisfied, the individual could eventually be convicted. Because the statute prescribes no standards to guide either an officer's or jury's discretion, what would satisfy one officer

[14] Appellants have simply misstated the interests at stake in this balancing test. The applicable balancing test pits society's interest in identification against the individual's interest in anonymity, not society's interest in patting down armed suspects versus privacy rights. In fact, where police officers reasonably believe a criminal suspect is armed, 647(e) *per se* never really comes into play at all. Under such circumstances police are empowered to conduct pat-downs irrespective of whether the suspect is "loitering" or "wandering."

or one jury may well prove unacceptable to another.

On the other hand, an arrest and conviction could also ensue if the individual refuses to account for his presence and remains silent. In this situation, the individual would be penalized for exercising his Fifth Amendment rights.

Clearly, then, the "accounting" requirement of 647(e) runs afoul of the Fifth Amendment. *Solomon* attempted to resolve this obvious infirmity by holding that the "accounting" requirement was ancillary to the obligation of producing identification. This resolution, however, is constitutionally inadequate. As long as the "accounting" requirement remains in force at all, it will pose an unreasonable threat to individuals opting to maintain their Fifth Amendment right to silence.[15]

CONCLUSION

In spite of the California Legislature's effort in 1961 to redraft Penal Code section 647(e) as a conduct-oriented "stop-and-identify" statute, the section remains fraught with vague terminology and imposes ambiguous requirements upon an uncomprehending public. Because it is vague, the statute also lends itself to arbitrary enforcement, as the differing interpretations given by Edward Lawson's various arresting officers attest. The statute also conflicts with fundamental rights under the First, Fourth and Fifth Amendments.

Aligned against these serious and far-reaching defects

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[15] As indicated in the previous section, the right to remain silent during a custodial detention also derives from the privacy protections of the Fourth Amendment.

is the dubious value of section 647(e) in controlling and preventing crime. Any protection from crime which the public might receive from a statute like 647(e) is already adequately provided by the stop-and-frisk standards of *Terry* v. *Ohio* (1968) 392 U.S. 1. While 647(e) does nothing to expand the crime-fighting value of the *Terry* standard, it poses a grave threat to the right of innocent people to remain free from arbitrary harassment and arrests.

There is no place in a free society for laws such as 647(e). It should be declared unconstitutional.

Respectfully submitted,

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Amicus Brief

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NO. 81-1320

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM KOLENDER et al
Appellant

v

EDWARD LAWSON
Appellee

BRIEF OF AMICUS CURIAE WAYNE COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLANT

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v

EDWARD LAWSON
Appellee

BRIEF OF AMICUS CURIAE WAYNE COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The Wayne County Prosecutor is the chief law enforcement officer of the county, prosecuting all criminal offenses in the county, including those in the City of Detroit.

Detroit Minicipal Code section 39-1-52.3 renders it unlawful for a person stopped because "a police officer has reasonable cause to believe that the behavior of (the)

individual warrants further investigation for criminal activity" to "refuse to identify himself, and to refuse to produce verification evidence, written or oral, of such identification," with a possible penalty of 90 days in jail or a $500.00 fine. This ordinance was declared unconstitutional by the Michigan Court of Appeals for reasons similar to those of the Ninth Circuit striking down California Penal Code 647(e) in the instant case. The issue of the propriety of that ruling was argued to this Court in **Michigan** v **DeFillippo,** 433 US 31; 61 LEd 2d 343; 99 S Ct 2627 (1979), but the case was resolved on other grounds. The Detroit Ordinance has thus remained legally unenforceable. Because Detroit Municipal Ordinance 39-1-52.3 and California Penal Code 647(e) as construed are strikingly similar, and because **amicus** has had occasion previously to urge the constitutionality of Detroit Municipal Code 39-1-52.3 to this Court but the question was not resolved by this Court, amicus submits that he has a substantial interest in this Court's resolution of the constitutionality of California Penal Code 647(e).

SUMMARY OF ARGUMENT

California Penal Code 647(e), as construed in **People** v **Solomon,** 33 Cal App 3d 427; 108 Cal Rptr 867 (1973), requires a person to provide reliable identification when so requested by a police officer who has a reasonable suspicion of criminal activity on the part of the person upon whom the request is made. As construed, the statute incorporates the stop standard of **Terry** v **Ohio,** 392 US 1 (1968). The Detroit Ordinance, 39-1-52.3, specifically incorporates the **Terry** standard, and requires the person stopped to state his identity, and provide verifiable proof, written or oral, of that identification. Both laws are penal, carrying a penalty for violation.

Amicus argues that the laws are constitutional exercises of the police power of the state, falling within the state's power to define crime and ordain punishment. The laws serve a valid state purpose, the investigation and detection of crime, see **Terry** v **Ohio, supra,** and the means employed, a requirement of a statement of identity under circumstances where a reasonable suspicion exists that the person stopped is engaged in criminal activity, is reasonably related in scope to accomplishment of that purpose. Further, the laws do not run afoul of the Fifth Amendment, as the information required is neutral in character, and may be required by the government in many contexts (tax forms, the census, witnesses at a trial, etc). Moreover, the California statute by construction, and the Detroit Ordinance by explicit language, provide fair notice to the citizens as to what conduct is forbidden. The decision of the Ninth Circuit is thus in error, and this Court should uphold the California statute and reverse the judgment below.

ARGUMENT

A PENAL LAW WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO **TERRY** v **OHIO** TO REFUSE TO IDENTIFY HIMSELF, AND REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY, IS WITHIN THE POLICE POWER OF THE STATE AND IS INCONSISTENT WITH NO AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. THE POLICE POWER

This case poses a question as to the limitations on the legislative exercise of the police power, or, more particularly, the function of the courts in reviewing a legislative exercise of that power. First, it must be observed that courts should and do exercise great restraint in this area. In an earlier era the Court did not exercise such restraint, see e.g. **Lochner** v **United States,** 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905); **Coppage** v **Kansas,** 236 US 1; 35 S Ct 240; 59 L Ed 441 (1915); **Adkins** v **Children's Hospital,** 261 US 525; 43 S Ct 394' 67 L Ed 785 (1923); however, **Nebbia** v **New York,** 291 US 502; 54 S Ct 505; 78 L Ed 940 (1934), heralded a new attitude, as evidenced by the statement that "the legislature is primarily the judge of the necessity of such an enactment (a penal statute prohibiting the sale of milk under established prices), that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." 291 US at 537-538. That this policy of restraint still prevails is demonstrated by the more recent case of **Griswold** v **Connecticut,** 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965). There, though holding the statute in question unconstitutional as in conflict with the penumbral right of privacy,

the Court specifically refused to be guided by **Lochner** v **United States, supra,** saying, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 US at 482. Thus, keeping in mind the paramount role of the legislature in determining the wisdom and need for the law in question, that all presumptions are to be indulged in favor of its validity, and that the statute may not be annulled unless "palpably in excess of legislative power," amicus will discuss whether the statute exceeds the police power because of the very nature of the conduct it seeks to prohibit.

The principles governing the limits of the police power are stated in **Lawton** v **Steele,** 152 US 133, 137; 14 S Ct 499; 38 L Ed 385 (1894) (referred to as the "classic statement" of the rule in **Goldblatt** v **Town of Hempstead,** 369 US 590, 594-595; 82 S Ct 987; 8 L Ed 2 d 130 (1962)):

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

See also **Carolene Products** v **Thompson,** 276 Mich 172; 267 NW 608 (1936); **Grubaugh** v **City of St. Johns,** 384 Mich 165; 180 NW 2d 801 (1970); **People** v **Poucher,** 398 Mich 316; 247 NW2d 798 (1976); 2 Cooley, Constitutional Limitations (8th ed), p. 733; 16 Am Jur 2d, Constitutional Law, sec 277 et seq. It has also been stated that, because of the presumption of validity, "...if the

relation between the statute and the public welfare is debatable, the legislative judgment must be accepted." **Grocers Dairy Co v Department of Agriculture Director,** 377 Mich 71, 76; 138 NW2d 769, 770 (1966). Because of the wide discretion given the legislature, and the presumption of validity, one commentator has suggested that this Court has "all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public," preferring to be "on more solid ground" in ruling, if a statute is to be invalidated, that it violates due process "on the more specific ground that it intrudes upon the protections of the Bill of Rights..." LaFave and Scott, Criminal Law, sec. 20, p. 138.

In the instant case it is plain that if the public interest is served, it is served generally. Amicus submits that there is a public interest in requiring persons to respond to questions, at least to the extent of identity, when the officer has a "reasonable suspicion that criminal activity is afoot." **Terry v Ohio, supra. Terry** allows a forcible stop, a Fourth Amendment seizure of the person, under appropriate circumstances. But what is the purpose of the stop if not to investigate?

> One general (governmental) interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of **investigating possibly criminal behavior** even though there is no probable cause to make an arrest. (emphasis added). **Terry v Ohio,** 392 US at 22.

And how did officer McFadden investigate in Terry? He "approached the three men, identified himself as a police officer, and **asked for their names**" (emphasis added). 392 US at 23.[1]

If the purpose of the stop is for investigation, how is the investigation to occur but by the asking of questions, such as identity, as done by officer McFadden? In his concurring opinion in **Terry**, Justice White observed that while under appropriate circumstances a person may be "briefly detained against his will while pertinent questions are directed to him" he is "Not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest..." 392 US at 34. While refusal to answer may furnish no basis for an arrest in the absence of specific authority to arrest, this is an entirely different matter from whether the legislature has the power to make refusal to answer a crime. If it does, then refusal to answer does furnish a basis for arrest, not under the officer's right under **Terry** to briefly detain persons for investigatory purposes, but to hold the person to answer for the crime he has committed.

Laying aside all other questions, amicus submits that the legislature may make failure to answer an inquiry as to identity a crime under circumstances where there exists a reasonable suspicion that criminal activity is afoot in that the ordinance does serve the public welfare. If a Fourth Amendment seizure of the person for investigatory purposes is permissible under appropriate circimstances because in balancing the interests involved the

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[1]See also **Adams** v **Williams**, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972):

> A brief stop of a suspicious individual in **order to determine his identity** or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time (emphasis added).

intrusion is justified by the governmental interest "of crime prevention and detection," 392 US at 22, then requiring an answer to the investigative inquiry, at least as to identify, is justified by the same public interest of crime prevention and detection, and is thus within the police power. See **People** v **Solomon**, 33 Cal App 3d 429; 108 Cal Rptr 867 (1973), **cert denied** 414 US 951 (1974), where in upholding section 647(c), the court stated:

> It is within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional right...We find the legislative power employed here to compel identification is consistent with constitutional right. 108 Cal Rptr at 871.[2]

B. "THE MORE SPECIFIC GROUND" OF THE PROTECTIONS OF THE BILL OF RIGHTS

1. The Fourth and Fifth Amendments

In his dissenting opinion in **Michigan** v **DeFillippo**, 443 US 31 (1979) Justice Brennan stated that:

> ...the ordinance (39-1-52.3), by means of a transparent expedient — making the constitutionally protected refusal to answer itself a substantive offense — sanctions circumvention by the police of the Court's holding that refusal to answer police inquiries during a Terry stop furnishes no basis for a full-scale search and seizure. Clearly this is a sheer piece of legislative legerdemain not to be countenanced. 443 US at 45.

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[2]See Footnote on page 9

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[2]The Uniform Arrest Act, Sec. 2, while not making failure to identify subsequent to a **Terry** stop a criminal act, does authorize a two hour detention:

> 1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
> 2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
> 3) The total period of detention provided by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

The Act has been adopted in a number of states, e.g. Del code Anno title II, sec. 1902; NH Rev Stat, sec. 594.2; General Laws of RI, sec 12-7-1; Anno Mo Stat, sec 84.710.

Also of importance is the Model Penal Code, sec 250.6, which is a penal statute:

> A person commits a violation if he loiters or prowls in a place at a time, or in a manner not usual for law-abiding individuals, under circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor...**refuses to identify himself**...(emphasis added).

See also Model Code of Pre-Arraignment Procedure, Tentative Draft no. 1, sec 2:02(1) through (3).

Further, "the conduct of Detroit police in this case plainly violated Fourth Amendment limitations." 443 US at 46. Amicus submits that the dissent is the result of (1) a transformation of the right against **compulsory self-incrimination** into the "catch phrase" of a "right to silence", where in truth only the former comports with the language of the constitution, and the latter does not in fact exist; and (2) a confusion of the concept of police authority to detain, arrest, or search under the Fourth Amendment and the authority of a state under the police power to define crime and ordain punishment.

The position of the **DeFillippo** dissent stands or falls on its assertion that "individuals accosted by police on the basis merely of reasonable suspicion have...a right to remain silent" and that a demand for identity is a command to the person stopped "to relinquish his constitutional right to remain silent..." 443 US at 45, 46. The dissent is illustrative of Justice Rehnquist's observation in dissent from the denial of certiorari in **Sneed** v **Stringer**, _____ US _____, 70 L Ed 2d 402 (1981):

> The Constitution is a written document, but cases and controversies involving its provisions necessarily result in opinions from this Court. Those opinions themselves contain aphorisms, whose resemblance to the actual text of the Constitution grows increasingly remote as they are used as substitutes for the text itself, applied to wholly different situations than that addressed in the original case, or simply used as convenient "catchwords" to justify a given result. In my opinion, that is what has happened here. Constitutional building blocks have been piled on top of one another so that the connection between the original provision in the Constitution and the application in a particular case is all but incomprehensible.

The Fifth Amendment provides, in relevant part, that no person "shall be **compelled** in any criminal case to be a **witness against himself.**" The **DeFillippo** dissent errs by falling victim to that beguiling linguistic error of translating the right against **compulsory self-incrimination** into a "right to remain silent" with the attendant logical inference that no information may be compelled from a person. Certainly, if it were true that the constitution provided a general right to remain silent the exercise of that right could not be punished. But this constitutes a fundamental misreading of the Fifth Amendment: there **is no** constitutionally guaranteed right to remain silent; rather, there is a right not to be **compelled** to give **self-incriminating** information to the state. It logically follows that the state can, with no violation of the Fifth Amendment, require a person to provide neutral or non-incriminatory information, and penalize his refusal so to do. Certainly it cannot be said that identity is self-incriminatory. Concededly, if the individual is wanted the revelation of his identity may cause his arrest, but this does not render the statement of identity self-incriminatory. If the contrary were true, then **United States** v **Dionisio,** 410 US 1 (1973) (voice exemplar); **Schmerber** v **California,** 384 US 757 (1966) (blood sample); **Gilbert** v **California,** 388 US 263 (1967) (handwriting exemplars); and **United States** v **Wade,** 388 US 218 (1967) (lineup, and speak words allegedly spoken by robber) were all wrongly decided.

In sum, a person may be compelled to supply information so long as he is not compelled to give information which will incriminate him. If it were otherwise, witnesses could not be subpoenaed to testify, and income tax and census forms would go unfiled. The government **does**

have the power to require the disclosure of neutral information; whether it may make criminal a refusal to provide such information is a question concerning the police power and no other constitutional provision or amendment (see A, **infra**). California Penal Code 647(e) makes criminal the refusal to provide neutral information, and it is within the power of the state, to require such disclosure, and the compelled disclosure is without the ambit of the Fifth Amendment. See **People** v **Wegar**, 251 Cal App 2d 584; 59 Cal Rptr 661, 673 (1965), **cert den** 389 US 1047 (1968); and **People** v **Solomon, supra**, at 872.

The dissent in **DeFillippo** also stated that "application of the ordinance to respondent by Detroit Police in this case trenched upon respondent's Fourth Amendment rights..." 443 US at 43. The rationale of the dissent was that the ordinance authorized searches of the person upon less than probable cause to arrest, and that it thereby was in direct conflict with the Fourth Amendment. But this view involves a major rewriting of the ordinance (and to carry it forward to California Penal Code 647(e) would be to rewrite that statute). Neither the ordinance nor the California statute authorize any search at all. They authorize detentions of the person which are constitutionally permissible under **Terry**, and make criminal the refusal of the person stopped to identify himself. If he identifies himself, no search occurs; if he violates the law, he is subject to arrest for the crime he has committed, and may be searched incident that arrest. But the law does not authorize the search. It defines certain conduct as criminal — it is the Fourth Amendment which then authorizes the search. If the government has the power to require neutral information from an individual under circumstances of a **Terry** stop, as amicus has argued it does,

then an arrest upon probable cause for violation of that ordinance, and a search incident that arrest, cannot violate the Fourth Amendment. Again, the statute does not make suspicious conduct criminal, it makes criminal the refusal to provide neutral information, and the government has the power in many circumstances to require the giving of neutral information. No constitutional provision is involved in the question of whether the statute is constitutional other than the police power, and due process in terms of vagueness/notice.

2. Due Process

As noted, amicus believes it error to gauge the constitutionality of the statute here at issue by reference to the Fourth Amendment. In **DeFillippo, supra,** the Michigan Court of Appeals stated that the Detroit Ordinance was vague because "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime". But neither can an innocent citizen generally know when a police officer has probable cause for his arrest, and thus cannot know when resisting arrest will be a crime, yet it would not rationally be suggested that the offense of resisting a lawful arrest is unconstitutionally vague. Just as the arrest is governed by probable cause standards, the stop in the instant case is governed by the standards of **Terry** v **Ohio.** Thus, no claim can be made that the ordinance gives the police "unbridled discretion" to stop persons. See **People** v **Solomon, supra,** 108 Cal Rptr at 871. The focus of the

inquiry as to vagueness should be on the term "identify", and the court in **People** v **Wegar,** supra, 59 Cal Rptr at 667-668 closely analyzed the term "identify" and found it sufficiently precise.

> Here, again, we may look to the commonly accepted meaning of the words. According to the American College Dictionary, "identify" means to "establish as being a particular person or thing' attest or prove to be as purported or asserted." "Identification", according to College Law Dictionary means "Proof that a person or thing is the person or thing (he or) it is supposed or represented to be..." 59 Cal Rptr at 667-668.

Amicus agrees with **People** v **Solomon, supra** at 871 that the "person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification must first be made." The area possibly open to interpretation is the phrase "verifiable proof, written or oral," or "genuine" identification. It is amicus' position that "verifiable or genuine proof" is any information of identity that could be verified as "proof that a person...is the person...(he) is supposed or represented to be." **People** v **Wegar, supra.**

One other point requires comment; that is, the notion that the ordinance and statute attempt to make criminal conduct which is innocent. This formulation appears to be a way of saying that the ordinance is outside the police power, a proposition rejected by amicus previously. Amicus would here note **People** v **West,** 106 NY 293; 12 NE 610, quoted in Clark and Marshall, Crimes, Sec 1:05, p. 29:

It is not a good objection to a statute prohibiting a particular act, making its commission a public offense, that the prohibited act was, before the statute, lawful or innocent, and without any element of moral turpitude. It is the provice of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, and not at all evil in their intrinsic quality...the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere.

CONCLUSION

Wherefore, for the reasons set forth above, California Penal Code 647(e) is constitutional, and amicus urges that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN — P24381
Principal Attorney,
Research, Training and Appeals
12th Floor; 1441 St. Antoine
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224-5794

TAB: jd

Dated: March 25, 1982

Motion

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1320

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM KOLENDER, ET AL

Appellant,

v

EDWARD LAWSON,

Appellee.

MOTION BY WAYNE COUNTY PROSECUTOR FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR ADDITIONAL TIME FOR ORAL ARGUMENT

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

TIMOTHY A. BAUGHMAN
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MOTION BY WAYNE COUNTY PROSECUTOR FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR ADDITIONAL TIME FOR ORAL ARGUMENT

NOW COMES WILLIAM L. CAHALAN, Prosecuting Attorney for the County of Wayne, by EDWARD REILLY WILSON, Deputy Chief, Civil and Appeals, and TIMOTHY A. BAUGHMAN, Principal Attorney, Research, Training and Appeals, amicus curiae in the above-captioned case, and requests leave to participate in oral argument, and for ten (10) additional minutes for that purpose, and as reasons says:

1. As stated in the Brief of Amicus Curiae, amicus is the chief law enforcement officer of the County. Amicus argued the issue presently before the Court in Michigan v DeFillippo, 433 US 31 (1979), arguing in support of a Detroit ordinance. The ordinance is still unenforceable as this Court's opinion in DeFillippo was based on a different ground. Amicus thus has a substantial interest in this Court's decision in the case.

2. Amicus and appellant have not taken conflicting positions; however, the emphasis of their position is substantially different, appellant stressing due process vagueness considerations, and amicus stressing Fifth Amendment considerations (whether a demand for identification involves the Fifth Amendment at all) and the police power of the state.

3. Amicus submits that his position is not simply a reiteration of that of appellant, and that argument by amicus would be of aid to the Court on the resolution of the questions before it.

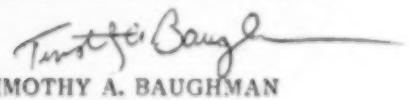
RELIEF

Wherefore amicus requests leave to participate in oral argument, and that ten (10) extra minutes be granted for that purpose.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals



TIMOTHY A. BAUGHMAN
Principal Attorney
Research, Training and Appeals

TAB:plw

Docket Sheet

NO. 81-1320-AFX	TITLE William KOLENDER, et al., Appellants v. Edward Lawson

DOCKETED	COURT
Jan. 13, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: A. Wells Petersen , Paul F. Sowa, John W. Wood
	Counsel for Appellee: Mark D. Rosenbaum
Jan. 13, 1982	Statement as to jurisdiction filed. (RECORD FILED).
Jan. 13, 1982	Appendix filed.
Feb. 12, 1982	Motion to affirm filed.
Feb. 17, 1982	DISTRIBUTED. 3-5.
March 8, 1982	Probable jurisdiction NOTED.

Apr. 12, 1982	Motion to dispense with printing the joint appendix filed.
Apr. 14, 1982	DISTRIBUTED. 4-30. (Above motion).
Apr. 16, 1982	Brief, amicus curiae, of Wayne County Prosecutor's Office in support of appellant filed.
Apr. 23, 1982	Brief for the appellant H. A. Porazzo filed.
Apr. 26, 1982	Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., et al. filed.
Apr. 24, 1982	Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae filed.
May 3, 1982	The motion of the parties to dispense with printing the joint appendix is DENIED. The motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae is GRANTED.
May 6, 1982	Order extending time to file the appellee's brief on the merits until July 21, 1982.
May 24, 1982	Motion of Wayne County Prosecutor for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed.
June 7, 1982	The motion of Wayne County Prosecutor for leave to participate in oral argument as amicus curiae and for additional time for oral argument is DENIED.
July 10, 1982	Joint appendix filed.
July 15, 1982	Order further extending time to file the appellee's brief on the merits until Aug. 5, 1982.
July 23, 1982	Brief, amicus curiae, of the State Public Defender of California in support of appellee filed.

(Over)

81-1320

Title

No.

DATE	PROCEEDINGS AND ORDERS
Aug. 9, 1982	Brief, amicus curiae, of the Center for Constitutional Rights in support of appellee filed.
Aug. 9, 1982	Brief for the appellee filed.
Aug. 9, 1982	Motion of California Attorneys for Criminal Justice for leave to file a brief as amicus curiae filed.
Aug. 13, 1982	Brief, amici curiae, of National Lawyers Guild, et al.
Sept. 3, 1982	CIRCULATED.
Oct. 22, 1982	In the Matter of Appointment of Amicus Curiae to Argue in support of Judgment below filed.
Oct. 25, 1982	DISTRIBUTED. 10-29. (In the Matter of Appointment of Amicus Curiae to Argue in support of Judgment below).
Nov. 1, 1982	Treating respondent's letter of October 19, 1982, as a motion for leave to present oral argument pro se, the motion is DENIED. Mark D. Rosenbaum, Esquire, of Los Angeles, California, a member of the Bar of this Court, is invited to argue this case, as amicus curiae, in support of the judgment below.
Nov. 1, 1982	Reply brief for appellants Duffy, Larson, Moulton, etc. filed. (D).
Nov. 8, 1982	ARGUED.